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Brief of Pence for Appellants.

Filed Sept. 1, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

SHIRLEY T. HIGH and JESSIE M. HIGH,
Appellants,

vs.

FREDERICK E. COYNE, as Collector of United States Internal Revenue for the First District of Illinois, and ELLEN T. HIGH, as Executrix of the Last Will and Testament of James L. High, deceased,
Appellees.

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BRIEF AND ARGUMENT FOR APPELLANTS.

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Appellees.

STATEMENT.

Appellants here filed their bill of complaint in the Circuit Court of the United States for the Northern District of Illinois on the 14th day of February, 1899, against Frederick E. Coyne, as Collector of United States Internal Revenue for the First District of Illinois, and against Ellen T. High, as executrix of the last will and testament of James L. High, deceased, for the purpose of removing a cloud upon their real estate title, and incidentally thereto to have a tax declared null and void, attempted to be levied under and by virtue of section

29 and 30 of an act of Congress, entitled, "An Act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898, creating such cloud, and to enjoin the collector from collecting and the executrix of the estate of Mr. High from paying such tax, and to restrain a breach of trust on the part of such executrix in making such payment. In the bill it is alleged that James L. High, the father of complainants, died October 3, 1898, testate, naming said Ellen T. High as executrix, and that his will has been duly admitted to probate; that in and by said last will, testator devised and bequeathed all his property, real and personal, in equal parts to his wife, said Ellen T. High, and to complainants, Shirley T. High and Jessie M. High, his children; that the real estate so devised and described therein is located in said District, said devisees being in possession thereof; that said James L. High left a large amount of personal property, valued at more than two hundred and fifteen thousand dollars over and above all debts and obligations of said estate.

The bill then sets out sections 29 and 30 of said act of Congress, approved June 13, 1898, relating to the taxation of legacies and distributive shares of personal property hereafter set forth.

Complainants also further set out in their bill of complaint that by virtue of the alleged authority of said act, the defendant, Coyne, as such collector, has made a demand in writing upon said defendant, Ellen T. High, requiring and compelling her, as such executrix, to make and return to said collector a schedule or statement of the legacies and distributive shares of said estate, stating the names of all persons entitled to any beneficial interest therein, and giving the amount of said alleged tax that

has accrued and is due thereon; that said collector is threatening in case said executrix fails or refuses to make and return said schedule or statement that he will make out such list and valuation himself and will assess the tax thereon; and moreover, that he will commence proceedings in the name of the United States against such executrix and will subject the said real and personal property to sale by a decree of court, and that from the proceeds of such sale he will collect the amount of such alleged tax or duty, together with all costs and expenses.

And they further allege that said executrix states and gives out that she intends, as such executrix, to make and return to said collector such schedule or statement of said legacies, together with the amount of the tax alleged to be due thereon, and threatens, intends, and will, unless restrained by an order of this court, pay the amount of said tax to said collector in pursuance of such notice and demand.

They further allege that by the terms and provisions of said act it is provided that such alleged tax or duty shall be a lien or charge for twenty years upon all the property left by any deceased person where the personal estate left by such decedent is by said act made subject to such tax or duty, unless the same be, before that time, fully paid and discharged.

They further allege that by reason of the terms and language of such provision of said act such tax has become and is now a lien and charge upon the real estate so held by complainants as aforesaid, and that it is a cloud or incumbrance upon the title thereto and interferes with the sale and disposition thereof.

They allege that the provisions of said act are uncon-

stitutional, null and void, in that such tax being a direct tax in respect to the property upon which said tax is, by said act, directed to be assessed, is not in and by said act apportioned among the several states as required by sections 2 and 9 of article 1 of the Federal Constitution; that said tax, if not a direct tax, is, nevertheless, unconstitutional, null and void, in that it is not uniform throughout the United States; and in that said act is an unwarranted interference by Congress with the power and rights of the several states to exercise exclusive power in all matters pertaining to the control and regulation of the devise and descent of property; and in that it is an unauthorized assumption by Congress of powers not conferred upon it by the Constitution of the United States.

They further allege that the threatened action of said collector in making out such lists and valuations, and in assessing said tax thereon, and in commencing suit in the name of the United States against said executrix and in subjecting such property, real and personal, to sale upon a degree of court for the payment of said tax, and said threatend act of said executrix will result in great and irreparable loss and injury to complainants for which they would and could have no adequate or proper remedy in a court of law.

Complainants pray that said provisions of said act be declared unconstitutional, null and void, and that the title of complainants to the real estate described be decreed to be free and clear of the lien or charge imposed by said alleged act and from the cloud and incumbrance thereby created and that the executrix be enjoined from making or returning such schedule and from paying such alleged tax, and, as incidental to said relief, that Frederick E. Coyne, the collector, be perpetually enjoined and re-

strained from collecting or attempting to collect such tax and from commencing any proceeding, etc., and from committing any of the acts and things so threatened to be done by him, and for general relief.

A general demurrer was filed to said bill by counsel for the United States, and upon hearing of said demurrer said bill was dismissed for want of equity. The Circuit Court in deciding the same delivered an opinion, which will be found in printed record, page 10.

The sections of the revenue law approved June 13, 1898, relating to the taxation of legacies and distributive shares of personal property, are sections 29 and 30, and read as follows:

> "Sec. 29. That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax to be paid to the United States, *as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand dollars and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be:*
>
> "First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and

every hundred dollars of the clear value of such interest in such property.

"Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

"Third. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendent of a brother or sister of the father or mother of the person who died possessed, as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

"Fourth. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

"Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: PROVIDED, That all legacies or property passing by will, or by the laws of any state or territory, to husband or wife of the person died possessed as aforesaid, shall be exempt from tax or duty.

"*Where the amount or value of said property shall exceed the sum of tweney-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of daty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall*

not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of such property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dallars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of such property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.

"Sec. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid, for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interests therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to said collector or deputy collector a schedule, list, or statement in duplicate of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or

receipts duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator or trustee to be credited and allowed such payment by every tribunal which, by the laws of any state or territory, is, or may be, empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector as aforesaid within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list or statement of such legacies, property or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list or statement of such legacies, property or personal estate, under oath, as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property or personal estate, or give the names and relationships of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction

to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof, all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge or custody any record, file or paper containing or supposed to contain any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesatd, shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge or custody, any such records, files or papers, shall refuse or neglect to exhibit the same on request as aforesaid, he shall forfeit and pay the sum of $500; provided, that in all legal controversies where such deed or title shall be the subject of judicial investigation the recital in said deed shall be *prima facie* evidence of its truth, and that the requirements of the law have been complied with by the officers of the government."

Sections 29 and 30 of the Revenue Law of 1898 are an exact copy of sections 124 and 125 of the act of 1864 (see 13 U. S. Stat. at Large, 285, 286), excepting the portions in italics in section *29* of the present act, which are not in the act of 1864, and excepting the rate of taxation imposed, and excepting that the word "collector" in section 30 of the present act was "assessor" in section 125 of the act of 1864; otherwise it is an exact

copy. There is no provision in the act of 1864 increasing the tax on legacies based upon the increased amount of the estate from which the legacies are to be paid, nor were there any exceptions save an exception in favor of husband and wife.

The portion of the act of 1864 relating to succession to real estate, reads as follows (section 126):

> "That for the purposes of this act the term 'real estate' shall include all lands, tenements and hereditaments, corporeal and incorporeal; that the term 'succession' shall denote the devolution of title to any real estate; that the term 'person' shall be held to include persons, bodies corporate or associations."

Section 127 reads as follows:

> "That every past or future disposition of real estate by will, deed or laws of descent by reason whereof any persons shall become beneficially entitled in possession or expectency to any real estate or the income thereof upon the death of any person dying after the passage of this act shall be deemed to confer on the person entitled by reason of any such disposition a 'succession,' and the term 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote the grantor, testator, ancestor or other person from whom the interest of the successor has been or shall be derived."

Section 128. * * *

Section 129. * * *

Section 130. * * *

Section 131. * * *

Section 132. * * *

Section 133 reads as follows:

> "That there shall be levied and paid to the United States in respect of every such succession, as aforesaid, according to the value thereof, the following duties, that is to say: * * *"

Said appellants now assign the following errors:

Assignment of Errors.

1. The said Circuit Court erred in holding that the Federal government has the power to tax directly or indirectly the right or privilege granted by the State of Illinois to take by will the legacies in question bequeathed to appellants by the decedent, James L. High, and also in holding that the tax in question is valid and binding upon appellants.

2. The Circuit Court erred in holding that the tax in question is not a direct tax upon the legacies bequeathed out of, or arising from, the personal property left by decedent, James L. High, to appellants by his last will and testament, and also in holding that said tax is valid and binding upon them.

3. The said Circuit Court erred in holding that the tax in question is an indirect tax upon the right or privilege to take by will the legacies in question bequeathed to appellants by the decedent, James L. High, and also in holding that such tax is an excise, duty or impost, and as such is valid and binding upon appellants.

4. The said Circuit Court erred in holding that the tax in question is an indirect tax and is uniform throughout the United States, and also in holding that the tax in queston is valid and binding upon appellants.

5. The said Circuit Court erred in not holding that the tax in question is unconstitutional and void and not binding upon appellants.

6. The said Circuit Court erred in holding the tax in question to be constitutional and binding upon appellants.

7. The said Circuit Court erred is dismissing appellants' bill of complaint for want of equity.

Wherefore, they pray that said cause may be reversed and remanded and that they may be restored to whatever they may have lost by reason of said decree.

BRIEF.

I.

JURISDICTION.

The Circuit Court of the United States has power to entertain jurisdiction to remove a cloud upon title to real estate, and incidentally to restrain the collection and payment of an unconstitutional tax creating such cloud and to restrain and control an executrix in the administration and threatened breach of a trust. If a bill be demurrable for want of equity, still if the court possesses the power to adjudicate upon the subject brought into controversy, and if the defendant submits to such jurisdiction and does not raise the question that there is a remedy at law by proper pleading, then this court cannot raise it for the first time, especially where counsel for defendant waives the question or does not raise it.

Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S., 553.

Holland v. *Challen*, 110 U. S., 15.

Hollins v. *Brierfield C. & I. Co.*, 150 U. S., 371.

Shelton v. *Platt*, 139 U. S., 591.

Reynolds v. *Crawfordsville Bank*, 112 U. S., 405.

United States v. *Wilson*, 118 U. S., 86.

Cummings v. *National Bank*, 101 U. S., 153.

Union Pacific Ry. Co. v. *Cheyenne*, 113 U. S., 525.

Allen v. *Hanks*, 136 U. S., 300.

II.

The United States Government cannot tax the right or privilege of inheritance, which is not a common right, but is the creation of the state legislature, and such privilege or right of inheritance exists by virtue of the exercise of a power reserved to the state; and to permit such a privilege or right to be taxed implies the right on the part of the general government to retard, impede, burden, control, abridge and destroy the operation of a constitutional law, enacted by the state legislature, to carry into execution the powers vested in the state government.

Collector v. *Day*, 11 Wall., 124.
United States v. *R. R. Co.*, 17 Wall., 327.
Friedman v. *Siegel*, 10 Blatch., 327.
Fifield v. *Close*, 15 Mich., 505.
Warren v. *Paul*, 22 Ind., 276.
State v. *Garton*, 32 Ind., 1.
Smith v. *Short*, 40 Ala., 385.
Jones v. *Keep*, 19 Wis., 369.
Sayles v. *Davis*, 22 Wis., 225.
Moore v. *Quirk*, 105 Mass., 49.
Weston v. *Charleston*, 2 Pet., 449.
M'Culloch v. *Maryland*, 4 Wheat., 431, 439.
Bank of Commerce v. *New York City*, 2 Black, 620.
Ward v. *Maryland*, 12 Wall., 418, 427.
Railroad Co. v. *Peniston*, 18 Wall., 5.
United States v. *Perkins*, 163 U. S., 625.
Magoun v. *Illinois Trust and Savings Bank*, 170 U. S., 283.

California v. *Pacific R. R. Co.*, 127 U. S., 40.

Harman v. *Chicago*, 147 U. S., 396.

Moran v. *New Orleans*, 112 U. S., 69.

Van Brocklin v. *Tennessee*, 117 U.S., 151.

III.

The tax in question is direct and hence subject to the rule of apportionment among the states as provided in the constitution, and this tax being unapportioned is therefore unconstitutional.

(a) *The tax in question purports to be a direct tax upon the legacy or distributive share and not a tax upon the right to inherit or take by will.*

Act of Congress, June 13, 1898, Sec. 29 and 30.

Act of Congress, 1864, 13 U. S. Stat. at Large, 285, 286. Sec. 124 & 125.

Gibbons v. *Ogden*, 9 Wheat., 1.

Rhode Island v. *Massachusetts*, 12 Pet., 731.

Martin v. *Hunter's Leesee*, 1 Wheat., 904.

Waller v. *Harris*, 20 Wend., 561.

Sedgwick's Statutory Law, 260.

Cooley on Taxation (2d Ed.), 266, 268.

Pollock v. *Farmers' Loan and Trust Co.*, 157 U. S., 429.

Same v. *Same*, 158 U. S., 601.

Scholey v. *Rew*, 23 Wall., 331.

Hylton v. *United States*, 3 Dall., 171.

United States v. *Perkins*, 163 U. S., 625.

Magoun v. *Illinois Trust and Savings Bank*, 170 U. S., 283.

(b) *The tax in question does not fall within the definition of an "excise, a duty or an impost" within the meaning of the constitution.*

Attorney General v. *Reed*, L. R. 10 Appeal Cases (Privy Council), 141.

Bank of Toronto v. *Lambe*, L. R. 12 Appeal Cases (Privy Council), 575, 581.

Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S., 558.

Same v. *Same*, 158 U. S., 631.

Political Economy, by John Stuart Mill (Ed. by Laughlin), pp. 550, 562.

36 Federalist (Ed. by J. C. Hamilton), p. 275.

Nicol v. *Ames*, 173 U. S., 509.

Brown v. *State of Maryland*, 12 Wheat., 419.

Cook v. *Pennsylvania*, 97 U. S., 566.

Almsy v. *California*, 24 How., 169.

IV.

There is a lack of uniformity in the taxation of the classes of persons and property provided for in section 29 of this act. The constitution provides that "All duties, imposts and excises shall be uniform throughout the United States." Not only is there lack of uniformity in the classes provided for but there is a lack of uniformity created by the exemptions of the statute.

Gulf, Col. & Santa Fe R. R. Co. v. *Ellis*, 165 U. S., 150.

Bell's Gap R. R. Co. v. *Pennsylvania*, 134 U. S., 232.

Giozza v. *Tiernan*, 148 U. S., 657.

Kentucky Railroad Tax Cases, 115 U. S., 321.

Hallinger v. *Davis*, 146 U. S., 314.

Barbier v. *Connolly*, 113 U. S., 27.

Mugler v. *Kansas*, 123 U. S., 623.

Magoun v. *Illinois Trust & Savings Bank*, 170 U. S., 283.

State v. *Ferris*, 53 Ohio St., 314.

Cooley's Constitutional Limitations (5th Ed.), *p. 515.

Cooley on Taxation (2d Ed.), pp. 214, 215.

Sutton's Heirs v. *City of Louisville*, 5 Dana (Ky.), 28, 31.

City of Lexington v. *McQuillan's Heirs*, 9 Dana (Ky.), 513.

Barbour v. *Louisville Board of Trade*, 82 Ky., 645, 653.

State v. *Indianapolis*, 69 Ind., 375.

Opinion by Field, J., Income Tax Cases, 157 U. S., 592.

ARGUMENT.

I.

JURISDICTION.

The Circuit Court of the United States has power to entertain jurisdiction to remove a cloud upon title to real estate and incidentally to restrain the collection and payment of an unconstitutional tax creating such cloud; and to restrain and control an executrix in the administration or threatened breach of a trust even if the allegations of the bill be insufficient; in other words, if it be demurrable for want of equity, still if the court possesses the power to adjudicate upon the subject brought in controversy and if the defendant submits to such jurisdiction and does not raise the question that there is a remedy at law by proper pleading, then this court cannot raise it for the first time, especially where counsel for defendant waives the question or does not raise it.

Pollock v. *Farmers' Loan and Trust Co.*, 157 U. S., 553.

Holland v. *Challen*, 110 U. S., 15.

Hollins v. *Brierfield C. & I. Co.*, 150 U. S., 371.

Shelton v. *Platt*, 139 U. S., 591.

Reynolds v. *Crawfordsville Bank*, 112 U. S., 405.

United States v. *Wilson*, 18 U. S., 86.

Cummings v. *National Bank*, 101 U. S., 153.

Union Pacific Ry. Co. v. *Cheyenne*, 113 U. S., 525.

Allen v. *Hanks*, 136 U. S., 300, 311.

The *Pollock* case, the *Income Tax* cases, 157 U. S., 553, was a suit brought in equity to enjoin the payment of an unconstitutional tax, and this court sustained the jurisdiction of the Circuit Court as well as its own jurisdiction.

In that case Mr. *Chief Justice Fuller* said:

> "The jurisdiction of a court of equity to prevent *any threatened breach of trust* in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained. *Dodge* v. *Woolsey*, 18 How., 331; *Hawes* v. *Oakland*, 104 U. S., 450.
>
> "As in *Dodge* v. *Woolsey*, this bill proceeds on the ground that the defendant would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of, and paying, an unconstitutional tax; and also on allegations of threatened multiplicity of suits and irreparable injury."
>
> "The objection of adequate remedy at law was not raised below, nor is it now raised by appellees if it could be entertained at all at this stage of the proceedings; *and so far as it was within the* power of the government to do so, the question of jurisdiction for the purposes of the case was explicitly waived on the argument."

In *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S., 371, 380, this court, speaking by Mr. *Justice Brewer*, said:

> "Defenses existing in equity suits may be waived, just as they may in law actions, and, when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of eqnity, and a decree rendered will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal. * * * If there was a defense existing to the bills as framed, an objection to the right of these plaintiffs to proceed on the ground that their legal remedies

had not been exhausted, it was a defense and objection which must be made *in limine*, and does not of itself oust the court of jurisdiction. This doctrine has been recognized not merely in the cases cited, but alse in those of *Reynes* v. *Dumont*, 130 U. S., 354; *Kilbourn* v. *Sunderland*, 130 U.S., 505; *Brown* v. *Lake Superior Iron Co.*, 134 U. S., 530. None of these cases question the proposition that if the objection is seasonably presented it will be effective."

This court in *Sheldon* v. *Platt*, 139 U. S., 591, said (p. 594) by Mr. Chief Justice Fuller:

"It was ruled in *Dows* v. *Chicago*, 11 Wall., 108, 112, that a suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal, but that there must exist. in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, *throw a cloud upon the title of the complainant.*"

In the same case, the Chief Justice, quoting from the opinion of *Union Pacific Ry. Co.* v. *Cheyenne*, 113 U. S., 516, the language of Mr. Justice Bradley, said:

"'Cases of *fraud*, accident or mistake, cases *of cloud upon the title of one's property and cases where one is threatened with irremediable mischief*, may demand other remedies than those the common law can give, and these, in proper cases, may be afforded in the courts of equity.'"

As above stated, it is a universal principle that where there is *fraud* or where the tax sought to be enjoined is a cloud upon the title, that courts of equity will entertain jurisdiction to remove such cloud.

In *Union Pacific Ry. Co.* v. *Cheyenne*, 113 U. S., 525, the court said:

> "It cannot be denied that bills in equity *to restrain the collection of taxes illegally imposed have frequently been sustained.* But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of taxpayer's lands, the loss of his freehold by means of the tax sale would be a mischief hard to be remedied. *Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief.*"

Aside from the unconstitutionality of the law as alleged by us as a basis for injunction, which was not granted, we have set out various circumstances in our bill which show that no adequate remedy at law could be obtained. It is alleged in this case that the collector has made a demand upon the executrix requiring and compelling her to make a return to the collector, stating the names of all persons entitled to any beneficial interest therein, and giving the amount of said alleged tax that has accrued and is due thereon; that said collector has threatened, in case the executrix fails and refuses to make a return of such schedule and statement, that he will make out such list and valuation himself and will assess the tax thereon, and that he will commence proceedings in the name of the United States against said executrix as being the person who has such personal

property in her actual and constructive possession, and will subject the same to be sold by a decree of the court and that from the proceeds of such sale he will collect the amount of such alleged tax or duty, together with costs and expenses.

That the executrix states and gives out that she intends, as such executrix, to make a return to the collector as required, and threatens, and intends, and will, unless restrained by an order of this court, pay the amount of said alleged tax to said collector in pursuance of such notice and demand.

The bill points out that the alleged tax or duty is a lien or charge for twenty years upon all the property left by any deceased person, and that, in pursuance of the provisions of said law, said supposed tax has become and now is a lien and charge upon the real estate so held by appellants, and devised to them by the decedent, and that it is a cloud or incumbrance upon their title to the real estate and interferes with the sale and disposition thereof.

That the law is unconstitutional and void for the reasons stated in the bill.

That the threatened action of said collector in assessing said tax and commencing suit against the executrix and in subjecting such property, both real and personal, to be sold upon a decree of the court for the payment of said tax and said threatened action of the executrix to pay the same will result in great and irreparable loss and injury to complainants, for which they have no adequate remedy at law.

It is sufficient to state that this tax is a cloud upon the title of complainants, and being so, a court of equity has jurisdiction to remove the same.

All the facts constituting such cloud are fully set out in the bill and hence we bring ourselves clearly within the principles laid down by this court governing a court of equity in such cases.

The enjoining of the payment of the tax is incidental to the relief sought to remove the tax as a cloud and to declare it so, even though no injunction were prayed; and a court of equity has jurisdiction to remove this cloud and complainants have a right to come into a court of equity for that purpose independent of any question of injunction restraining the collection of the tax.

It would seem to us, also, that a tax law which is unconstitutional does not fall under the condemnation of the statute of the United States which provides that

> "No suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court."

That if the law be unconstitutional it is the same as if it were never written upon the statute book and that cannot be called a tax which has no authority of law whatever any more than if the page of the book where it is written were a blank. Surely the government of the United States cannot, like the baron robbers, levy reprisals and contributions without authority of law, and to say that the officers of the government who are attempting to enforce a contribution for which there is no law whatever, cannot be enjoined but could protect themselves by pleading the statute in question would be a traversty upon justice. Any such effort on the part of an officer of the United States would be a *fraud,* and the bill could be well maintained on the ground of fraud alone as was declared by this court in *Union Pacific Ry. Co.* v.

Cheyenne, *supra*, quoting from Judge Cooley on Taxation, in which this court, adopting such language, says:

> "Cases of *fraud*, accident or mistake, cases of cloud upon the title to one's property and cases where one is threatened with irremediable mischief may demand other remedies than those the common law can give, and these, in proper cases, may be afforded in courts of equity."

If such an effort of an officer in such a supposed case were not a fraud, it would be difficult to imagine of any case in the world being a fraud. The government could not be responsible for its officers making such reprisal against citizens, as there would be no pretended authority for any such action of its officers. It would be the boldest robbery to permit such an officer to levy such a contribution if there were no word of authority in the statute books authorizing it, and the law being unconstitutional, we must consider the page of the statute book as a blank upon this question. Moreover, this court holds that where there is a trust and the beneficiaries are threatened with damage, that a bill in equity will lie to prevent a breach of such trust, as was stated by this court in the *Income Tax* cases.

Surely if this law be unconstitutional then the act of the executrix, who is trustee, would be the broadest violation of the trust conferred upon her, and hence a court of equity would interfere in the administration of such trust and prevent the trust property from being squandered.

But the grounds upon which this bill may be maintained are so numerous and well defined that it is useless further to discuss them. The solicitor general has informed us that he will make no point as to the jurisdiction of the court, and, as we understand, the government is anxious to have the case disposed of as it is interfering with the collection of the taxes arising under this law.

II.

The United States Government cannot tax the right or privilege of inheritance, which is not a common right but is the creation of the state legislature, and such privilege or right of inheritance exists by virtue of the exercise of a power reserved to the states; and to permit such a privilege or right to be taxed implies the right on the part of the general government to retard, impede, burden, control, abridge and destroy the operation of constitutional laws enacted by the state legislature to carry into execution the powers vested in the state government.

Collector v. *Day*, 11 Wall., 124.
United States v. *Railroad Co.*, 17 Wall., 327.
Friedman v. *Siegel*, 10 Blatchford, 327.
Fifield v. *Close*, 15 Mich., 505.
Warren v. *Paul*, 22 Ind., 276.
State v. *Garton*, 32 Ind., 1.
Smith v. *Short*, 40 Ala., 385.
Jones v. *Keep*, 19 Wis., 369.
Sayles v. *Davis*, 22 Wis., 225.
Moore v. *Quirk*, 105 Mass., 49.

The states have no power by taxation or otherwise to retard, impede, burden or in any manner control the operation of constitutional laws enacted by Congress to carry into execution the powers granted to or vested in the general government of the United States.

Weston v. *Charleston*, 2 Pet., 449.
M'Culloch v. *Maryland*, 4 Wheat., 431, 439.
Bank of Commerce v. *New York City*, 2 Black, 620.

Ward v. *Maryland*, 12 Wall., 418, 427.
Railroad Co. v. *Peniston*, 18 Wall., 5.

Chief Justice MARSHALL, in *McCulloch* v. *Maryland*, 4 Wheat., 436, says:

> "The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power by taxation, *or otherwise*, to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

It was in the same case that Chief Justice Marshall said that "the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create."

He also said in the same opinion that "A power to create implies a power to preserve. That a power to destroy, if wielded by a different hand, is hostile to and incompatible with those powers to create and preserve."

He also said: "That the power of taxing it (the United States Bank) by the states may be exercised so as to destroy it, is too obvious to be denied."

It was in the same case that he laid down the proposition that the power of the general government granted to it by the constitution makes all its laws the supreme laws of the land, saying:

> "It is of the very essence of supremacy to reremove all obstacles to its action within its own sphere, and so to modify every power vested in the subordinate government as to exempt its own operation from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain."

Hence it follows in the case at bar that if the general government has the power to tax the privilege or right of inheritance under the state laws, it may destroy that privilege or right by its taxation. It has the power, if the law be constitutional, to levy a tax for the full amount of the distributive shares or of the legacies given by the law of the state, and hence by the possession of such a power, by taxation of this privilege or right, it tends to retard, impede, burden and control the operation of state laws, and tends to prevent the carrying into execution of the powers vested in the state government. If the power exists on the part of the general government to do this, it necessarily follows that the general government can destroy the power of the state to create inheritances and the right to take by will.

And hence it interferes with the rights reserved to the states under the constitution because it will not be contended that the general government has the right to establish or regulate inheritances or the right to take by will. This is not one of its powers but it is the power which has been reserved in the constitution to the states themselves. In the State of Illinois and other states there are state inheritance tax laws, and if the general government also possess the power to tax the same right so taxed by the state, then inasmuch as the law of Congress is the supreme law of the land, Congress can abridge or destroy the power of the state and deprive it of any tax under its own law upon a subject created by the state.

In *Weston* v. *Charleston*, 2 Pet., 467, Chief Justice MARSHALL quotes and affirms the language used in the *McCulloch* case as follows:

"'The states have no power by taxation or other-

wise to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.' "

And the Chief Justice said in that case (p. 467):

> "We retain the opinions which were then expressed."

And in the same case the Chief Justice said:

> "*The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission.*"

If this be true, then, the state's sovereignty extends over the right of inheritance, which cannot be abridged or controlled by the Federal government.

Mr. Justice Nelson in the case of *Bank of Commerce* v. *New York City*, 2 Black, 632, in referring to the decision of Chief Justice Marshall in the *Weston* case, said:

> "It was considered (in that case) as a necessary consequence of the supremacy of the Federal government that its action in the exercise of its legitimate powers should be free and unembarrassed by any conflicting power of the states, and that the powers of the state cannot rightfully be so exercised as to impede and obstruct the free course of those measures which this government may rightfully adopt.
>
> "He further said that 'the sovereignty of a state extends to everthing which *exists by its own authority or is introduced by its permission*, but not to those means which are employed by Congress to carry into execution powers conferred upon that body by the people of the United States.' "

Then, after referring to the *McCulloch* case and others, the court said (p. 632):

> "The doctrine maintained in those cases is that the powers granted by the people of the states to the general government and of the states to the general

government, and embodied in the constitution, are supreme within their scope and operation, and that this government may exercise these *powers in its appropriate department*, free and unobstructed by any state legislation or authority; that within this limit this government is sovereign and independent, and any interference by the state governments, tending to the interruption of the full legitimate exercise of the powers thus granted, is in conflict with that clause of the constitution which makes the constitution and laws of the United States passed in pursuance thereof the supreme law of the land."

And Mr. Justice NELSON further said in that case that,

"The conclusive answer to the attempted exercise of state authority in all these cases is, that the exercise is in derogation of the powers granted to the general government, within which, it is admitted, it is supreme. That government whose powers, executive, *legislative* or judicial, whether it is a government of enumerated powers like this one or not, are subject to the control of another distinct government, cannot be sovereign or supreme, but subordinate and inferior to the other. This is so palpable a truth that argument would be superflous. Its functions and means essential to the administration of the government, and the employment of them, are liable to constant interruption and possible annihilation. * * * *And the principle is equally true in respect to every other power or function of a government subject to the control of another.*"

And at the end of his opinion Mr. Justice NELSON said:

"Each is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or *functions exercised.*"

The same principles are again reviewed and affirmed in *Railroad Company* v. *Peniston*, 18 Wall., 5. And, speaking of that class of subjects

where the right to tax is concurrent in both the general and state governments, Mr. Justice Strong lays down the principle that the claim of the United States government, as the supreme authority, must be preferred, and that "There is nothing in the constitution which contemplates or authorizes any direct abridgement of this power by state legislation," and as bearing upon the questions here involved, Mr. Justice STRONG says (p. 30):

> "While it is true *that government cannot exercise its power of taxation so as to destroy the state governments or embarrass their lawful action*, it is equally true that the states may not levy taxes, the direct effect of which shall be to hinder the exercise of any power which belonged to the national government."

And then he says, p. 31:

> "The states are, and they must ever be, co-existent with the national government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. *Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states or prevent their efficient exercise.*"

It will be observed from the quotations made as to the powers of the general government that these decisions also discuss the correlative power of the state governments and recognize the fact that the general government would have no power to retard, impede, burden, control, abridge or destroy the powers of the state government or any of its departments, *legislative*, judicial or executive, any more than the latter would have the right to so legislate as to retard, impede, burden, control, abridge or destroy the powers of the general government.

The principle certainly cannot be denied. The diffi-

culty only is in the application. The principle, however, is well recognized in other cases decided by this court, that the powers of the state governments cannot be interfered with by the general government. If the state government has the constitutional power to legislate upon any subject and thereby to create rights and privileges which do not exist *as a common right*, then the general government cannot legislate so as to affect the same subject in its attempts to carry out the powers actually conferred upon the general government. This is the limitation placed of necessity upon the powers actually conferred upon the general government by the constitution, that the general government cannot, in carrying out the power so conferred in any manner limit or control rights and powers which are vested in the state government, where the subject in controversy is the creation of state legislation, and cannot and does not exist without such state legislation; as, for instance, in the case at bar where the right to inherit and the right to take by will do not exist as of common right but only have an existence when created by the state government.

But in addition to these decisions already quoted from, we have the express decision of this court that the general government can no more interfere with these powers vested in the state government than the state government can interfere with the powers vested in the general government.

In *Collector* v. *Day*, 11 Wall., 113, the question arose as to the constitutionality of the revenue law passed in 1864 imposing a tax upon the income of all persons, whereby a tax was levied upon Day, as Judge of the Probate Court in the State of Massachusetts. His salary

was fixed by law and payable out of the treasury of the state. *Justice Nelson* delivered the opinion of this court.

> " It is conceded," he said, "that there is no express constitutional prohibition upon the states against taxing the means or instruments of the general government. But it was held in *McCulloch* v. *Maryland*, and we claim properly held, to be prohibited by necessary implication; otherwise the states might impose taxation to an extent that would impair, if not wholly defeat, the operation of the Federal authorities, when acting in their appropriate sphere. These views, we think, abundantly establish the soundness of the decision in the case of *Dobbins* v. *Commissioners of Erie*, 16 Pet., 435, which determined that the states were prohibited upon a proper construction of the constitution from taxing the salaries or emoluments of an officer of the United States, *and we shall now proceed to show that upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of a judicial officer of the state.*
>
> " It is a familiar rule of construction of the Constitution of the Union that the sovereign powers vested in the state governments by their respective constitutions remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the Tenth Article of the Amendments, viz: '*The powers not delegated to the United States are reserved to the states respectively or to the people.*' The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.
>
> "The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independent of each other within their respect-

ive spheres. The former in its appropriate sphere is supreme; but the states, within the limits of their powers, not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states. * * * Two of the great departments of the government, the executive and *legislative*, depend upon the exercise of the powers or upon the people of the states. The constitution guarantees to the states a republican form of government and protects each against violence. Such being the separate and independent condition of the states in our complex system as recognized by the constitution, and the existence of which is so indispensable, that without them the general government itself would disappear from the family of nations, it would seem to follow as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments for preserving their existence, *and fulfilling the high and responsible duties assigned to them in the constitution* should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, *which power acknowledges no limits*, but the will of the legislative body, imposing the tax, and more especially those means and instrumentalities *which are the creation of their sovereign and reserved rights*, one of which is the establishment of the judicial department and the appointment of officers to administer their laws. Without this power and the exercise of it we risk nothing in saying that no one of the states under the form of government guaranteed by the constitution could long preserve its existence. A despotic government might. * * * Thirteen states were in possession of this power (to establish a judicial department) and had exercised it at the adoption of the constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the states by their con-

stitutions which remained unaltered and unimpaired and in respect to which the state is as independent of the general government as that government is independent of the states. * * * The two governments are upon an equality, and the question is whether the power 'to lay and collect taxes' enables the general government to tax the salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution some of its most important functions, the administration of the law, and which concerns the exercise of a right reserved to the states.

We do not say that the mere circumstances of the establishment and appointment of officers to administer the laws being among the reserved powers of the state, disables the general government from levying the tax, as that depends upon the express power 'to lay and collect taxes,' but it shows that it is an original, inherent power, never parted with, and in respect to which the supremacy of that government does not exist and is of no importance in determining the question; and further, that being an original and reserved power and the judicial officers appointed under it being a means of instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise and the exemption of the officer from taxation by the general government stand upon as valid a ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officers in *Dobbins* v. *The Commissioners of Erie* from taxation by the states; for in that respect, that is, in respect to the reserved powers, the state is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessary, and for the sake of self-preservation exempt from taxation by the states, why are not those of the states, depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. *It*

> *is admitted that there is no express provision in the constitution that prohibits the general government from taxing the means and instrumentalities of the states,* nor is there any prohibiting the states from taxing the means and instrumentalities of that government. *In both cases the exemption rests upon necessary implication, and is upheld by the great law of self preservation; as any government whose means employed in conducting its operation, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?*"

The court then referring to the decision of the *Veazie Bank* v. *Fenno*, *supra*, where Justice Nelson dissented, said:

> "But notwithstanding the sanction of this taxation by a majority of the court (in that case) it is conceded in the opinion that 'the reserved rights of the states, *such as the right to pass laws; to give effect to laws through executive action;* to administer justice through the courts and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress.' This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain."

The foregoing decision, therefore, establishes the converse of the proposition laid down by Chief Justice Marshall in *McCulloch* v. *Maryland*, *supra*, which was conceded, however, in that case, and if the state governments stand upon the same basis as the general government touching the question of "the right to pass laws" upon any particular subject, and to carry them into effect. and that such right can not be taxed by the general government, then this very case falls within the

exemption claimed, from the necessity of the case, and the provision of the Constitution of the United States which confers express power "to lay and collect taxes" does not apply in this case.

It would seem there should be no question upon this subject, because if the general government can tax the right given by the laws of the State of Illinois or any other state to inherit, or the right to make laws on a particular subject and carry them into operation, then the power of taxation upon such right to inherit or make laws and carry them into operation is a power which may be used to destroy the right, and to retard, impede, burden, control, abridge and destroy the operation of constitutional laws enacted by the state. If it be true, then, as stated by Justice Nelson in the *Day* case, that the right of the states is just as well established as is the right of the general government to be exempt from control of any other government, such as the right to pass laws which are constitutional, then by changing the language of Chief Justice Marshall in *McCulloch* v. *Maryland*, *supra*, so as to state the converse of this proposition asserted by Chief Justice Nelson, we have the following:

> "The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the United States has no power by taxation or otherwise to retard, impede, burden or in any manner control the operations of the constitutional laws, enacted by the states, to carry into execution the powers vested in the state governments."

In the case of *United States* v. *Railroad Co.*, 17 Wall., 322, a tax was levied by the Federal government upon a railroad company created by the state on account of the indebtedness created by the railroad, and the corporation

was authorized under the law to retain such tax out of the dividends declared in payment of the interest upon such indebtedness. The City of Baltimore subscribed for a certain amount of the bonds for the Baltimore and Ohio Railway, and loaned its credit to said railway to the extent of the bonds issued to it. The city owned the bonds, and the attempt was to collect the tax upon the same from the railroad corporation, which corporation was authorized to retain such tax in making payments of interest or dividends. The corporation was made use of simply as a convenient means of collecting the tax. It was held by this court that a municipal corporation is a portion of the sovereign power of the state and is not subject to taxation by Congress upon its municipal revenues, and in the course of the opinion by Mr. Justice Hunt the court said:

> "The power of taxation by the Federal government upon the subjects and in the manner prescribed by the act we are considering is undoubted. There are, however, certain departments which are excepted from the general power. The rights of the states to administer their own affairs through their *legislative*, judicial and executive departments in their own manner through their own agencies is conceded by the uniform decisions of this court, and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the general government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed if any interference is permitted."

The foregoing cases illustrate the principle we are discussing, namely, that the power of legislation on the part of the state, and the power to grant rights and privileges touching the subject in question may not be retarded, im-

peded, burdened or in any manner controlled, nor can the operation of the constitutional laws passed by the state to carry into execution the powers vested in the state governments be taxed by the general government or in any way interfered with. This is the principle clearly announced in all the foregoing cases.

May the power of the state to pass inheritance laws and to grant rights and privileges to legatees and next of kin upon the principles before established be impeded or burdened or retarded or abridged in any manner by the general government? The tax in question, as we have seen, does interfere with, retard and impede the execution of the power so reserved to the state government. The power to pass laws of inheritance is a privilege possessed only by the state and the privilege of taking by inheritance does not exist except by virtue of the exercise of such power by the legislature. This prop. osition is clearly determined by the cases of

United States v. *Perkins*, 163 U. S., 625.
Magoun v. *Illinois Trust and Savings Bank*, 170 U. S., 283.

In *United States* v. *Perkins*, *supra*, this court discussed the character of the power vested in the legislature of the state to grant the privilege of inheritance and determined that this privilege was not a matter *of common right* but it was a privilege obtained from the state, which alone possessed the right and the power to determine and establish a rule of inheritance.

Mr. Justice Brown, in delivering the opinion, said:

"While the laws of all civilized states recognize in every citizen *the absolute right to his own earnings and to the enjoyment of his own property, and to the increase thereof during his life* except so far

as the state may require him to contribute his share for public expenses, *the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control.*"

And the court also said:

"In this view the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases, a declaration that in the exercise of that power he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain but subject to a *condition* that the state has a right to impose. Certainly if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property in the ordinary sense of the term but upon the right to dispose of it and it is not until it has yielded its contribution to the state that it becomes the property of the legatee. * * * This, therefore, is not a tax upon the property itself, but is merely the price exacted by the state for the privilege accorded in permitting property so situated to be transferred by will or by descent or by distribution. * * * Such a tax was also held by this court to be free from any constitutional objection in *Mager* v. *Grima*, 8 How., 490-493, Mr. Chief Justice Taney remarking that 'the law in question is nothing more than an exercise of the power which every state and sovereignty possesses of regulating the manner and terms within which property, real and personal, within its dominion may be transferred by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. * * * *If a state may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes would be required by its interest or policy.*'"

And in *Magoun* v. *Illinois Trust and Savings Bank*,

supra, this court in the discussion of a similar question as to the meaning and operation of an inheritance law, said, speaking by Mr. Justice McKenna, as follows (p. 288):

> "It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on successions. 2. The right to take property by devise or descent *is the creature of the law, and not a natural right—a privilege*—and, therefore, the authority which confers it may impose conditions upon it."
>
> "From these principles it is deduced that the *states* may tax the privilege, discriminate between relatives and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

The learned justice then quotes what was said by Mr. Justice Brown in *United States* v. *Perkins*, namely:

> "That while the laws of all civilized states recognize in every citizen the absolute right to his *own* earnings and to the enjoyment of his *own* property, and to the increase thereof *during his life*, except so far as the state may require him to contribute his share for public expenses, *the right to dispose of his property by will has always been considered purely a creature of statute, and within legislative control.*"

The court then quotes from the case of *Curry* v. *Spencer*, 61 N. H., 624, as follows:

> "Wills, therefore, testaments, the rights of inheritance and succession, are all of them *creatures of the civil or municipal law*, and accordingly are in all respects regulated by them."

These two cases show that this court considered the right of inheritance and the right to take by will *not as a common right—a natural right*—guaranteed by the constitution, but as a privilege within the

power of the state legislature to grant or withhold, and being a privilege it follows that it cannot be retarded, burdened or controlled in any way by the general government, and the right to levy such a tax, if it exists, would be a right to destroy or to control and burden the power contained in the legislature granting the privilege, and hence would be unconstitutional under the foregoing decisions.

This right or privilege of inheritance granted by the sovereign power of the state possesses the same virtues and is of the same essence as a franchise. A franchise must be granted by a sovereign authority; and it was held in the *Bank of Augusta* v. *Earl*, 13 Pet., 519:

> It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state."

And the Supreme Court of Illinois in the *Board of Trade* v. *People*, 91 Ill., 80, 83, quotes from the *City of Baltimore* v. *N. Y. & N. H. R. R. Co.*, 36 Conn., 255, as follows:

> " 'The term "franchise" has several significations and there is some confusion in its use, but when it is used in a statute or elsewhere in the law it is generally, if not always, understood as a special privilege conferred by grant from the state or sovereign power *as being something not belonging to the citizens of common right.*' "

And the Supreme Court of Illinois in the case cited also said:

> "No doubt the word 'franchise' is sometimes used as synonymous with privileges and immunities of a personal character; but in law its appropriate meaning is understood to be something which the citizen cannot enjoy without legislative grant."

We wish in this connection to quote one more case touching the power of one government to tax privileges or franchises or rights granted by another; that is the case of *California* v. *Pacific R. R. Co.*, 127 U. S., 40.

The government of the United States granted a charter to the Pacific Railroad Company, and the state of California passed a law taxing its franchises; and the Supreme Court of California held the law unconstitutional, and the State of California appealed the case to this court.

This court is unanimous in its opinion, affirming the decision of the Supreme Court of California. The opinion was delivered by Mr. Justice Bradley.

In that opinion this court said:

> "Assuming, then, that the Central Pacific R. R. Co. has received the important franchises referred to by grant of the United States, the question arises whether *they are legitimate subjects of taxation by the states.* They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company situated within the state. That is a different thing, *but may it tax franchises which are the grant of the United States?* In our judgment it cannot. What is a franchise? Under the English law Blackstone defines it as 'a royal privilege or branch of the King's prerogative, subsisting in the hands of a subject.' 2 Bl. Com., 37.
>
> "Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, *a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administered*, either by the gov-

ernment directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. *Under our system, their existence ana disposal are under the control of the legislative department of the government*, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

"In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a state without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice MARSHALL said in *McCulloch* v. *Maryland*, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend *that a power given to a person or corporation by the United States may be subjected to taxation by a state. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty.* It is unnecessary to cite cases on this subject. The principles laid down by this court in

McCulloch v. *Maryland*, 4 Wheat., 316; *Osborn* v. *The Bank of the United States*, 9 Wheat., 738, and *Brown* v. *Maryland*, 12 Wheat., 419, and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this court in *Thomson* v. *Pacific Railroad*, 9 Wall., 579, and *Railroad Co.* v. *Peniston*, 18 Wall., 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company and not upon its franchises or operations. 18 Wall., 35, 37.

"The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing powers. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present cases."

Applying the test according to the foregoing principles, let us look a little further into the legislation under consideration. Can the United States Government take away the privileges and rights granted by the State of Illinois, or by any other state? Can it destroy or abridge those privileges and rights so derived under the state law, or can it cripple them by onerous burdens? In other words, can it tax them? The power to tax such grant, right or privilege is the power to destroy or abridge or cripple the same, which was held in the *California* case could not be done. Can the government tax this franchise or privilege granted by the State of Illinois?

This court answered the proposition as follows in the

California case: "In our judgment, it cannot." Can this right of inheritance or this right to take by will be assumed or exercised without legislative authority? This court has answered that, it cannot be, in the *Perkins* case and in the *Magoun* case.

This court has said in the *California* case that no private person can take another's property unless the grant, right or privilege be conferred by the state government. If the general government has the power to tax this right or privilege, then, upon the basis that taxation is a burden and may be laid so heavily as to destroy the thing taxed or render it valueless, the general government interferes with or abridges or destroys the right to fix the laws of inheritance and to create the power to take by will, which, it is admitted, exists in the state government.

This right to inherit and to take by will is a portion of the power of the state government that confers it; to tax it is not only derogatory to the dignity, but subversive of the powers of the state government, and repugnant to its paramount sovereignty over the subject-matter of inheritance. Such is the language of this court in the *California case.*

It may be said that the general government will not abuse its discretion in regard to the taxing of an inheritance. If it has the power there is no limitation to its exercise, and as said in the *McCulloch* case by Chief Justice MARSHALL:

> "The discretion to tax being conceded, the power of such government that levies the tax may destroy the subject so taxed."

If the general government has the power to levy a tax at all it has the power to levy a tax equal to the whole

amount of the legacies or distributive shares, and thus destroy the entire operation of the state law. This is unconstitutional. This will not be permitted by this court.

We ought here to refer to the case of *Scholey* v. *Rew*, 23 Wall., 331, hereinafter commented upon as to other points.

This court, in *Scholey* v. *Rew*, placed its decision upon the ground that the tax in question was similar to an income tax, and that an income tax on personal property was an indirect and not a direct tax; but this court held in the *Income Tax* cases, that a tax upon income was a direct tax when derived from invested personal property, and hence the foundation of the decision in *Scholey* v. *Rew* was taken away by removing the reasons upon which the decision was based in that case by the subsequent decision of this court.

There was no discussion nor decision in the *Scholey* case as to the right of the Federal government to tax a privilege created and granted by the state government.

We call attention to the fact that the *Chief Justice*, in his opinion in the *Income Tax* case, 157 U. S., 577, 578, used the following language:

> "*Scholey* v. *Rew*, 23 Wall., 331, was the case of a succession tax which the court held to be 'simply an excise tax or duty' upon the devolution of an estate or the right to become beneficially entitled to the same or the income thereof, in possession or expectancy. It was like the succession tax of a state held constitutional in *Mager* v. *Grima*, 8 How., 490, *and the distinction between the power of a state and the power of the United States to regulate the succession of property was not referred to and does not appear to have been in the mind of the court.*"

From the foregoing language of this court in the *Income Tax* cases it was evident that the court felt that there was a difficulty in maintaining the *Scholey* case upon principle, and intimating that if it had been in the mind of the court that such right of inheritance was a right conferred by grant of the legislature, that the court could not have held that the general government had power to tax the same. The point in question not being discussed or decided, the *Scholey* case can not be drawn into a precedent, and we will hereafter show that the case in other particulars was decided incorrectly.

This court in its decisions, as we have heretofore shown, has never wavered upon the proposition that the national government cannot retard, impede, abridge or control the power vested in the state to legislate upon subjects reserved to the state; or to confer rights which have no existence except upon the grant of such rights and privileges by the legislatureof the state; that the right of inheritance is a right or privilege which has no existence separate and distinct from the right or privilege granted by the state legislature; that it is not a common right, or a natural right, such as the right which exists in every one to his own earnings, and to the enjoyment of his own property and the increase thereof *during his life*, and which is guaranteed by the state constitution;—but is a privilege conferred by; and purely a creature of the statute and within legislative control and has no existence outside of such legislation, and the Federal government cannot interferewith the operation of such legislation.

Par. 3, Sec. 8, Art. 1, of the Constitution of the United States, provides: "The Congress shall have

power to regulate commerce with foreign nations and among the several states and with the Indian tribes."

The ninth amendment to the Constitution of the United States provides: "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people."

The tenth amendment provides: "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively, or to the people."

Under the commerce provision of the constitution the United States licenses vessels for the coasting trade. In the case of *Harman* v. *Chicago*, 147 U. S., 396, it appears that the government of the United States enrolled and licensed certain tug boats named for the coasting trade. After they were so licensed by the general government the City of Chicago passed an ordinance providing:

> "Sec. 1. No person or persons shall keep, use or let for hire any tug or steamboat or towboat for towing vessels or craft in the Chicago river, its branches or slips connecting therewith, without first obtaining a license therefor in the manner and way hereinafter mentioned."

The ordinance provides that each tugboat should pay a license of $25 to the city for a period of one year.

> "Sec. 4. Any individual or person violating any provisions of this ordinance shall be subject to a fine of not less than $25 nor more than $50 for each offense."

The question arose in that case as to the validity or constitutionality of that ordinance. The court held that the ordinance was null and void for the reason that it was in antagonism to the commerce provision of the Constitution of the United States.

Justice FIELD delivered the opinion of the court and in it said:

> "In the present case a neglect or refusal of the owner of the tugs to pay the license required by the ordinance subjects him to the imposition of a fine. His only alternative is to pay the fine or the use of his tugs in their regular business will be stopped. Of course the ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States. It would be a burden and restraint upon that commerce which is authorized by the United States and over which Congress has control. No state can interfere with it or put obstructions upon it without coming in conflict with the supreme authority of Congress. The requirement that every steam tug, barge or tow-boat towing vessels or craft for hire in the Chicago river or its branches shall have a license from the City of Chicago is equivalent to declaring that such vessels shall not enjoy the privilege conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign. The other tugs are not confined to any one particular locality, but may carry on the trade for which they are licensed in any of the ports and navigable rivers of the United States. They may pass from the river and harbor of Chicago to any port on Lake Michigan or other lakes and rivers connected therewith."

In *Moran* v. *New Orleans*, 112 U. S., 69, 74, a law of Louisiana authorized the City of New Orleans to levy and collect a license upon all persons pursuing any trade, profession or calling and to provide for its collection, and the council of that city passed an ordinance to establish the rate of license for professions, callings and other business for the year 1880, and among others provided

that every member of a firm, or company, the agency, person or corporation owning and running tow-boats to and from the Gulf of Mexico should pay a license fee of $5. The owner of two steam propellers, measuring over 1,000 tons, duly enrolled and licensed at the port of New Orleans, under the law of the United States, for the coasting trade, employed them as tug-boats, in taking vessels from the sea up the river to New Orleans and from that port to the sea. The City of New Orleans brought an action against him to recover the license under the ordinance, and obtained a judgment in its favor, which on appeal was affirmed by the Supreme Court of the state. Being brought to this court, the judgment was reversed with directions to the court below to dismiss the action of the city. In deciding the case, this court, speaking by Mr. Justice MATTHEWS, said of the license exacted:

> "It is a charge explicitly made as the price of the privilege of navigating the Mississippi river between New Orleans and the Gulf in the coastwise trade; as the condition on which the State of Louisiana consents that the boats of the plaintiff in error may be employed by him according to the terms of the license granted under the authority of Congress. The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the state thus seeks to *burden* with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under and which he derives from, the Constitution and laws of the United States. The Louisiana statute declares expressly that if he refuses or neglects to pay the license tax imposed upon him, for using his boats in this way, he shall not be permitted to act under, and avail himself of the license granted by the United States, but may be enjoined from so doing by judi-

cial process. The conflict between the two authorities is direct and express. What the one declares may be done without the tax, the other declares shall not be done except upon payment of the tax. In such an opposition, the only question is, which is the superior authority; and reduced to that, it furnishes its own answer."

These cases show that where the power to legislate resides in one government granted to it by the constitution, the operation of such laws cannot be defeated or rendered useless by any other power or government. In those cases the power to regulate such commerce resided in the government of the United States by the express provision of the constitution, and hence the state governments were deprived of any right to legislate. The converse of the proposition is that where a power resides in the state government to legislate upon a particular subject and is reserved to the state government by the Constitution of the United States, expressly or otherwise, the United States government cannot interfere with the operation of such laws as are passed by the states.

In the case at bar, it is not denied, and cannot be, that the state government has the power to legislate touching the subject of inheritances and wills. That power is reserved to it by the Constitution of the United States, and hence the United States cannot interfere with the operation of any constitutional law so passed by the state. The only question is, therefore, as to whether the legislation of Congress in this case does interfere with the operation of the state law. We have shown by decisions heretofore quoted that any act of one government which interferes with or retards or abridges the power of another exercised under the provisions of its own constitution,

to carry its power into operation must be null and void. We have shown that the power to tax the operation of any law is the power to destroy or abridge the operation of such law and to defeat it.

In this connection we wish also to refer to the case of *Van Brocklin* v. *State of Tennessee*, 117 U. S., 151, 155, in which this court, by Mr. *Justice Gray*, said:

> "The sovereignty of a state extends to everything *which exists by its own authority* or is introduced by its permission. * * * The attempt to use the taxing power of a state on the means employed by the government of the Union in pursuance of the Constitution is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. The power to tax involves the power to destroy; *the power to destroy may defeat and render useless the power to create;* and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control."

If it be then conceded that the state government has the power to legislate upon the question of inheritances and wills, and the United States government has not, then there is a plain repugnance in conferring upon the United States Government a power to control the operation of the state law touching such subject—because this legislation relates to a subject the control of which is declared by this court to be supreme in the legislature of the state, and hence this power claimed by the United States Government to tax the operation of a state statute may destroy, defeat and render useless the power of the state to create such law. In other words, the United States has no power by taxation, or otherwise, to retard, impede, burden or in any manner control the operations of the

constitutional laws enacted by the states to carry into execution the powers vested in the state government.

III.

A DIRECT TAX.

Our next contention is that the tax in question is direct and hence subject to the rule of apportionment among the states as provided in the constitution, and this tax not being apportioned is therefore unconstitutional.

(*a*) The language of sections 29 and 30 of the act of June 13, 1898, under which the right of the government is asserted, plainly shows that the intention of Congress was to impose a tax *directly* upon legacies and distributive shares or upon the owners in respect thereof, and not upon the *right* to inherit the same, or to receive such legacies as a bequest.

Sec. 29 reads in part as follows:

> "That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing after the passage of this act from any person possessed of such property either by will or by the intestate laws of any state or territory, * * * shall be and hereby are made subject to a duty or tax to be paid to the United States as follows, that is to say: where the whole amount of said personal property shall exceed in value ten thousand, and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be:
>
> "First. Where the person or persons entitled to

> any beneficial interest in such property shall be the lineal issue or lineal ancestors, brother or sister of the person who died possessed of such property aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property."

Sub-paragraphs 2, 3, 4 and 5 use the same language as the first, except that the rate is increased according to the relation of the parties taking, to the decedent. The court will observe that the language is that the "legacies or distributive *shares arising from personal property*" passing by will or inheritance "*shall be and hereby are* made subject to a duty or tax to be paid to the United States."

Nothing is said about the right to take by inheritance or will being taxed, but that the legacies or distributive shares shall be taxed. The act purports to tax the *thing so taken and not the right to take it.* The first sub-paragraph reads that

> "Where the person or persons entitled to any *beneficial interest in such property* shall be the lineal issue or lineal ancestors, brother or sister to the person who died possessed of *such property* as aforesaid, at the rate of seventy-five cents for each and every hundred dollars *of the clear value of such interest in such property.*"

The words "*such property*" twice used in that paragraph refer to the entire estate of the deceased and that which is to be taxed is the *beneficial interest* taken by any person by will or inheritance and not the *right to take* such beneficial interest. The proviso at the end of the fifth sub-paragraph reads:

> "*That all legacies or property passing by will or by the laws of any state or territory* to husband or wife of the person (who) died possessed as aforesaid, shall be exempt from tax or duty."

This proviso makes clear the former language. It is not the right of the husband or wife to take such legacies but the legacies and inheritances themselves that are exempt, that is, the *property itself* in which such husband or wife become interested shall be exempt.

Section 30 provides that

> "Every executor, administrator or trustee before payment or distribution to the legatees or any parties entitled *to beneficial interest therein* shall pay to the collector or deputy collector of the district of which the deceased person was a resident *the amount of the duty or tax assessed upon such legacy or distributive share*, and shall also make and render to the said collector or deputy collector a schedule, list or statement in duplicate of the amount of such legacy or distributive share, *together with the amount of duty which has accrued or shall accrue thereon.*"

This language is still more explicit, and makes it certain that the Congress intended to tax the legacy or distributive share, and not the right to tax such legacy or distributive share, and is not a tax upon the succession or right of succession, but upon the property itself.

And said section 30 also provides that the schedule, list or statement above referred to "shall contain the names of each and every person entitled to any beneficial interest therein, together with the *clear value of such interest*, the duplicate of which schedule, list or statement shall be by him immediately delivered *and the tax thereon* paid to such collector."

Section 30 also provides:

> "Where the executor, administrator or trustee refuses or neglects to pay such tax or to deliver to the collector the schedule, list or statement of *such legacies, property or personal estate*, or shall deliver

to the collector a false schedule or statement of such legacies, property or personal estate, etc., or shall not truly and correctly set forth and state therein *the clear value of such beneficial interest*, or where no administration has been taken out, *the collector or deputy collector shall make out such lists and valuation as in other cases of neglect and refusal, and shall assess the duty thereon*, and the collector shall commence appropriate proceedings before any court of the United States in the name of the United States against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and *shall subject such property or personal estate*, or any portion of the same, *to be sold upon the judgment or decree* of such court, and from *the proceeds of such sale the amount of such tax or duty*, together with all costs and expenses of every description to be allowed to such court, shall be first paid."

The same section also provides that

"the deed or deeds, or any proper conveyance of such proper y or personal estate, or any portion thereof so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under or by virtue of such judgment or decree *and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act.*"

From the foregoing portions of the statute it is evident that the property itself is taxed and that a lien for the tax is created by the act upon the property. It is the legacy that is taxed and it is the legacy upon which the lien of the tax is created. No one would be bold enough to say that a lien would be created upon the right to inherit or take. Such a right cannot be taken hold of, impounded or sold by the govern-

ment. It is only the property or legacy or distributive share that is taken hold of and impounded and sold. If language is ever to have its natural meaning then surely in the construction of this act the natural common sense meaning is so explicit that there can be no escape from the conclusion that Congress intended to tax *the legacy or distributive share* and not the *right* to take and inherit the same, nor the right of devolution.

Will this court ascertain the meaning of Congress by the language used, which is plain, or will it obtain a different result by a refinement upon the language which wrests the same from its original significance?

In *Waller* v. *Harris*, 20 Wend., 561, the court said:

> "But if the courts have sometimes gone very far towards taking the place of law-makers it is but justice to say that of late years they have been striving, both here and in England, to get back again into their appropriate sphere of action. Except in relation to a few old statutes which were long since overwhelmed by commentaries and decisions, the current of authority at the present day *is in favor of reading statutes according to the natural and most obvious import of the language without resorting to subtle and* forced constructions for the purpose of either limiting or extending their operation."

See, also, Sedgwick on Statutory Law, p. 260.

Judge COOLEY, in his work on Taxation (2d Ed., p. 266), says:

> "It is thought to be only reasonable to intend that the legislature in making provision for such proceedings would take unusual care to make use of terms which would plainly express its meaning in order that ministerial officers might not be left in doubt in the exercise of unusual powers, and that the citizen might know exactly what were his duties and liabilities. A strict construction in such

cases seems reasonable, because, presumptively, the legislature has given in plain terms all the power it has intended should be exercised. It has been generally supposed that the like strict construction was reasonable in the case of tax laws."

And Judge COOLEY, in the same work, p. 268, quoting the language of Mr. Justice STORY, says:

"'In the first place, it is, as I conceive, a general rule in the interpretation of all statutes levying taxes for duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt such statutes are construed most strongly *against the government and in favor of the subject or citizens*, because burdens are not to be imposed or presumed to be imposed beyond what the statutes expressly and clearly import. Revenue statutes are in no just sense remedial laws or laws founded on any permanent public policy, and therefore are not to be liberally construed.'"

Then, if we measure the words used in the act in question by this common sense rule of construction, can there be any doubt that the Congress of the United States intended to tax directly the property which has already passed to the next of kin or legatees and not simply the right of devolution?

To tax the right and not the thing itself is a departure from the language used in the statute.

If this court will now recur to the case of *Pollock* v. *Farmers' Loan and Trust Company*, 157 U. S., and *Same* v. *Same*, 158 U. S., 601, it will see that the rule of construction contended for by us was there ratified, for in that case the language of Congress was:

"There shall be assessed, levied, collected and

> paid annually *upon the gains, profits and income* received in the preceding calendar year * * * a tax of two per centum on the amount so derived over and above $4,000 * * *."

The foregoing language was held by this court to impose a direct tax upon such income or the property from which it was derived, and if such language in the one instance imposes a direct tax we do not perceive why in the case at bar language almost identical does not also impose a direct tax. The language is:

> "*Any legacies or distributive shares arising from personal property* * * * shall be and hereby are made subject to a duty or tax, etc."

This court did not there hold that the tax so created was a tax upon the right to receive and take such income, but that it purported to be a tax upon the income itself, or upon the investment from which the income was derived, and the court there held distinctly that a tax on income from real and personal property was invalid upon the ground that it was a direct tax and not apportioned among the states.

A very strenuous effort was made in that case to induce the court to hold that an income tax was an excise tax, namely, a tax upon the right to take and hold such income. The same effort will be made in this case, but after the full investigation made in that case as to the meaning of direct and indirect taxation there would seem to be little left for a discussion in this case touching that proposition considered alone in the light of the language used.

It will be claimed that *Scholey* v. *Rew*, 23 Wall., 331, is an adjudication that the tax in question is an indirect tax, and it will also be shown that sections 29 and 30 of

the Revenue Law of 1898 are substantially an exact copy of sections 124 and 125 of the act of 1864. See 13 Statutes at Large, 285, 286.

It will be observed, however, that the decision in *Scholey* v. *Rew* was upon the right to tax the devolution or succession to real estate and not upon the right to tax the devolution or succession to personal property. There was no decision upon that portion of the statute relating to personal property. Under the act of 1864 the language expressly confers upon the government *the right to tax the devolution or succession to real estate*, but no such language is used in regard to personal property, and the omission in that portion of the act of the right to tax the devolution or succession to personal property has great force in the interpretation of sections 124 and 125, the statute under construction being a substantial copy of those two sections, which relate to personal property.

We may ask why the language was changed and why Congress did not use the language which was used touching real estate. The language touching real estate is as follows:

> "That there shall be levied and paid to the United States in respect of every such succession as aforesaid, according to the value thereof, the following duties, etc;"

And in section 126 of that act is the following:

> "That the term 'succession' shall denote the devolution of title to any real estate."

It is evident that a taxation upon the devolution of real estate or the passing of title to real estate means something very different from a taxation upon the thing passed or upon the devise or inheritance of that which has already been passed.

The court in the *Scholey* case simply had under construction the portion of that act relating to real estate, and why Congress changed the language in treating of the taxation of legacies and distributive shares of personal property we think can be attributed to no other cause than that they intended something else with reference to personal property as contradistinguished from real estate; that Congress did not intend the tax upon the devolution or passing of personal property but upon the property itself. We think so, on account of the language used, which makes it manifest that there was a different intention, touching personal property, possessed by Congress at the time. And what was the reason of such different intention? We may not ascertain precisely, but it would seem that the former decisions of this court up to the year 1864 made it plain to Congress that real estate as such could not be taxed directly without apportionment among the states. Such was the decision in the *Hylton* case, 3 Dall., 171.

Therefore, Congress expressly intended to avoid the effect of that decision as to real estate by taxing the devolution instead of the real estate itself, but so far as personal property was concerned Congress undoubtedly construed the decision in the *Hylton* case to be that it had the right to tax the same directly without coming within the provisions of the Constitution with reference to the apportionment of such taxes among the states. It seems to us that this is the only reasonable interpretation of the difference in the language used with reference to the taxation of real estate and the taxation of personal property in the act of 1864. There could have been no

other reason. It is evident that Congress intended expressly that the taxation so far as related to real estate could be only upon the right to inherit or to take by will and not upon the real estate itself, and that the intention of Congress as to personal property was that it had the right to tax directly the personal property so taken. We think this to be a reasonable explanation of the difference in the language used in that act.

The decision in the *Scholey* case was rendered in 1874, ten years after the passage of the act by Congress. Five of the judges of this court who were upon the bench in 1874, when the *Scholey* case was decided, were also upon the bench in 1864 when the act of Congress in question was passed, so that the entire bench in 1874 must have been entirely cognizant of the reasons influencing Congress to make a distinction between the taxation of real and personal property. Although it is clear from the language of the statute in regard to real estate that the intention was to tax the devolution, the court really placed its decision upon the ground that the decisions of this court had been before that time, that a tax on income was not a direct tax; and this court by Justice CLIFFORD said, that such decisions "cannot be distinguished in principle from a succession tax such as the one involved in the present controversy."

The reasons for the decisions seem to be quite unsatisfactory, and we have already shown and will presently be able to point out how the decision in that case in other particulars cannot be sustained; but for the purpose of this point we wish simply to call the attention of the court to the fact that the decision was based expressly upon the language pertaining to real estate and that the tax was a tax upon the devolution or right of succession and not against the property after it had passed to the legatees or next of kin.

The decision has no bearing upon the language of the two sections involved in this case, because the act of 1864 respecting personal property and the act in question copied therefrom do not purport to confer the power to tax the devolution or passing of personal property, which was the sole basis of the decision in the *Scholey* case as to real estate.

There are two cases which may be referred to by counsel for the government, first the *United States* v. *Perkins*, 163 U. S., 625, and next *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S., 283.

It was held in both of those cases that the tax imposed by the state laws of New York and Illinois respectively was a succession tax or a tax upon the right to inherit. In the first case, however, the New York statute expressly provided that the tax should be a succession tax or a tax upon the right to inherit.

The language is as follows (165 U. S., 626):

> "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of $500 or over."

The language of the Illinois statute does not in terms say that the tax shall be upon the succession, but the plain implication therefrom is that it is a tax upon the right of succession. But the construction, however, of the language adopted as to the state inheritance laws has no significance when we come to construe and apply the same to this Federal law.

It is true that the language used in some of these statutes of the states purports to levy the tax upon the legacies or inheritances, and such statutes have been construed by this court to be a tax upon the devolution or

right to inherit. That construction was given because the natural legal inference from the language used was that the charge or tax was imposed in payment for the privilege thereby granted by the state—the privilege being something which the state might grant or withhold —it being entirely within the power of the state government. It was not *a common right*, but it was a right belonging to the state, as such, to control as it chose, and hence the state could impose any burden in consideration of the privilege granted.

Mr. Justice BROWN, in the *United States* v. *Perkins*, said:

> "While the laws of all civilized states recognize in every citizen the *absolute* right to his own earnings and to the enjoyment of his own property and the increase thereof *during his life*, except so far as the state might require him to contribute his share for public expenses, *the right to dispose of his property by will* has always been considered purely a creature of statute and within legislative control."

It is implied upon the very face of the state statutes that the state retains so much of every estate by way of compensation for the privilege granted. To be sure it is a tax measured by the property inherited, but it is, nevertheless, a tax upon the right so granted and in compensation thereof. The plain legal effect is that it is a burden placed upon the right to inherit, *for there could be no right to tax property as such unequally*, except upon the basis of a privilege conferred, which authorizes the state to arrange into classes the persons upon whom such privilege is conferred. The tax under the state laws does not attach after the title has passed and become vested, but attaches concurrently with the grant and in consideration thereof, while the tax by the Federal statute has nothing

to do with the *passing of the title and confers no privilege not before acquired* under the state statute. There is, therefore, a basis in the nature of things for such construction of the state statutes, but as to the Federal statute now under construction, there is no basis for any meaning which is contrary to the language used, for the Federal government has no power to grant the privilege in question and therefore has no right to demand payment or compensation for such privilege. The title to the property passes without its consent, and it is the property and not the right to take it that is taxed by the Federal statute and which alone purports to be taxed thereby.

The United States government confers no privilege and therefore can demand nothing for a privilege or right not given by it—and the language used by Congress cannot be construed as an attempt to charge for a privilege not conferred by it. This statute is incapable of such construction given to the state statutes and such construction is in opposition to the letter and spirit of the Federal statute, and consequently the Federal statute must be construed according to its plain language as being an attempt to tax directly the property received by will or inheritance.

The language of a taxing statute is to be construed strictly against the government, and not liberally.

Cooley on Taxation, (2d Ed.) pp. 266, 268.

There is no ambiguity in the language of this statute, and no room for construction. A statute which should provide that *tea* should be taxed at a certain rate per pound cannot be construed so as to include *coffee* also. A statute which provides for taxation of the property in-

herited cannot be construed so as to include a tax upon the right to inherit, for it means something entirely different.

In the *Pollock* case, 157 U. S., 583, this court said:

> "*If by calling a tax indirect when it is essentially direct*, the rule of protection could be frittered away, one of the great landmarks defining the boundary between the nation and the states of which it is composed would have disappeared and with it one of the bulwarks of private rights and private property."

If by calling a tax upon legacies or distributive shares of an intestate estate an indirect tax when the language makes it essentially direct, then this bulwark of the constitution respecting direct taxes and their apportionment among the states is surely frittered away and private rights and private property would not receive that protection by the courts which the constitution intended.

(*b*) Does the nature of this tax fall within the definition of an "excise, a duty or an impost," according to the meaning of the constitution? The contention of the government is that this tax is a *duty or an excise*, and consequently an indirect tax and not to be apportioned. There is no doubt that in the constitution the words "duties, imposts and excises" are put in antithesis to "direct taxes," and were not intended to include any direct tax but wholly and only an indirect tax. It will not do for counsel to contend that because it may be a *duty or an excise* that it may be levied without apportionment among the states and without *reference to the fact* whether it be direct or indirect; that is begging the question. The chief justice in the *Pollock case*, on the rehearing, 158 U. S., 622, said:

> "It is said that a tax on the whole income of property is not a direct tax in the meaning of the constitution, but a duty, and as a duty leviable without apportionment whether *direct or indirect.* We do not think so. *Direct taxation was not restricted in one breath and the restriction blown to the winds in another.*"

Hence it follows that under the constitution only such "duties, excises and imposts" as are indirect may be levied without apportionment.

It is a *misnomer* to call that *a duty, an excise* or *an impost* which is a *direct* tax, for a duty, an excise or an impost are such *because they are indirect*, and because the burden can be shifted from the person who originally pays the same upon another.

The test fixed by the constitution is whether the tax is direct or indirect, and if direct, then, although such tax might fall under the definition of an excise, which we deem impossible, still it could not be levied except by apportionment among the states. The general definition of a duty or an excise or an impost given not only in the works of political economists but in the decisions of the courts also, is the following:

> "All taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect to their estates, whether real or personal, or the income yielded by said estates, and the payment of which cannot be avoided, are direct taxes."

This definition is supported by the following:

Attorney General v. *Reed*, L. R. 10 Appeall Cases (Privy Council), 141.

Bank of Toronto v. *Lambe*, L. R. 12 Appeal Cases (Privy Council), 575–581.

Pollock v. *Farmers Loan & Trust Company*, 157 U. S., 558.

Same v. *Same*, 158 U. S., 631.

Principles of Political Economy, by John Stuart Mill (Edition by Laughlin), 550-562.

36 Federalist (Edition by John C. Hamilton), p. 275.

In the British North America Act, passed by the English Parliament, it was provided that the general government of Canada should have exclusive power of indirect taxation, and that the provinces could only levy a direct tax for provincial purposes.

Atty. Genl. v. *Queens Ins. Co.*, L. R. 3 App. Cases, Privy Council (pt. 2), p. 1090.

The provincial legislature of Quebec levied a stamp duty of 10 cents on every exhibit produced in court in every action pending therein, and the question arose as to its invalidity or unconstitutionality under the act of Parliament. The question came before the Privy Council. (See *Attorney General* v. *Reed*, L. R. 10 Appeal Cases (Privy Council, 141.) It was very fully discussed in the opinion by the Earl of Selborne, Lord Chancellor, in the course of which he said:

> "What is the meaning of the words 'direct taxation'? Now, it seems to their Lordships that those words must be understood with some reference to the common understanding of them which prevailed among those who had treated more or less scientifically such subjects before the act was passed. Among those writers we find some divergence of view. The view of Mill, and those who agree with him, is less

unfavorable to the appellant's arguments than the other view, that of Mr. McCulloch and M. Littré. It is, that you are to look to the *ultimate incidence* of the taxation as compared with the moment of time at which it is to be paid; that a direct tax is—in the words which are quoted here from Mr. Mill's book on political economy—'one which is demanded from the very persons who it is intended or desired should pay it.' And then the converse definition of indirect taxes is, 'those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.'"

The court then discusses the facts of the case with reference to the definitions above given, and finally says:

"The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases, but the best general rule is to look to the time of payment, and *if at the time the ultimate incidence is uncertain* then, as it appears to their Lordships, it cannot in this view be called direct taxation within the meaning of the second section of the ninety-second clause of the act in question. Still less can it be called so if the other view, that of Mr. McCulloch, is correct."

In the case of the *Bank of Toronto* v. *Lambe*, L. R. 12 Appeal Cases (Privy Council), 575-581, another case of direct or indirect taxation arose in connection with the construction of the British North America Act. This case was also heard in the Privy Council and the opinion was delivered by Lord Hobhouse. In that case the Province of Quebec imposed certain taxes upon banking institutions doing business in that province. The point was raised that the tax attempted to be levied was not a direct tax but an indirect tax, and hence not within the power of the provincial legislature to levy.

The court said:

"These appeals raise one of the many difficult questions which have come up for judicial decision under the provisions of the British North America Act, 1867, which apportions legislative powers between the parliament of the Dominion and the legislatures of the provinces. It is undoubtedly a case of great constitutional importance. * * * In the case of banks the tax imposed is a sum varying with the paid-up capital, and an additional sum for each office or place of business. * * *

"First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words 'direct' and 'indirect' according as they find that the burden of the tax abides more or less with the person who first pays it. * * * Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

"And after some consideration Mr. Kerr chose the definition of John Stuart Mill as the one he would prefer to abide by. That definition is as follows:

"'Taxes are either direct or indirect. A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs.'

"'The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.'

"It is said that Mill adds a term—that to be strictly direct a tax must be general; and this condition was much pressed at the bar. Their lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point; nor would they presume to say whether for economical purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

"Their lordships then take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellant's counsel, not only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the federation act.

"Now whether the probabilities of the case or the

frame of the Quebec act are considered, it appears to their lordships that the Quebec legislature must have intended and desired that the very corporations from whom the tax is demanded should *pay and finally bear it.* It is carefully designed for that purpose. It is not like a customs duty which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid by the consumer; and even those who do not accept the conclusions of the economists maintain that it is paid, and intended it to be paid, by the foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded. But the tax now in question is demanded directly of the bank apparently for the reasonable purpose of getting contributions for provincial business. It is not a tax on any commodity which the bank deals in and can sell at enhanced price to its customers. It is not a tax on its profits nor on its several transactions. It is a direct lump sum, to be assessed by simple reference to its paid-up capital and its places of business. It may possibly happen that in the intricacies of mercantile dealings the bank may find a way to recoup itself out of the pockets of its Quebec customers. But the way must be an obscure and circuitous one, the amount of recoupment cannot bear any direct relation to the amount of tax paid, and if the bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec government. For these reasons their Lordships hold the tax to be direct taxation within clause 2 of section 92 of the Federation Act."

The two cases above cited are referred to in the opinion of the chief justice in the *Income Tax Cases*, 158 U. S., 631, with approval.

The definition of an indirect tax and the quotation

made in the above opinion from Mill will be found in Laughlin's Edition of Mill's Principles of Political Economy, p. 550. This statement by Mill seems to be the most accurate that we have seen, and it runs throughout the decisions in the Income Tax cases.

This court, by Chief Justice FULLER, in the Pollock case, p. 558, said:

> "Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or the income yielded by such estate, and the payment of which cannot be avoided, are direct taxes."

It appears evident upon examination of the opinion in that case, both in the 157 U. S. and in the 158 U. S., that this court adopted the definition above given and as laid down by John Stuart Mill in his work on Political Economy, as did also the judges of the Privy Council in their interpretation of the British North America Act, 1867, which is similar in its language to the Constitution of the United States. The Chief Justice in his first opinion refers to the language used in the debate in the House of Representatives in 1794, as follows:

> "Mr. Dexter observed that his colleague 'had stated the meaning of direct taxes to be a capitation tax, or a general tax on all the taxable property of the citizen; and that a gentleman from Virginia (Mr. Nicholas) thought the meaning was that all taxes are direct which are paid by the citizen without being recompensed by the consumer; but that, where the tax was only advanced and repaid by the consumer, the tax was indirect. He thought that both opinions were just, and not inconsistent, though the gentlemen had differed about them. He thought that a general tax on all taxable property was a di-

> rect tax, because it was paid without being recompensed by the consumer.' Annals 3rd Congress, 644, 646. At a subsequent day of the debate Mr. Madison objected to the tax on carriages as 'an unconstitutional tax,' but Fisher Ames declared that he had satisfied himself that it was not a direct tax, as 'the duty falls not on the possession, but on the use.' Annals, 730."

It cannot be denied, therefore, that the opinion of this court in regard to the definition of direct and indirect taxes is that laid down by Mr. Mill and other political philosophers.

Mr. Whitney, the assistant attorney general, in his discussion of the *Pollock* case, 157 U. S., 471, said:

> "By general consensus of the economists of the present century, a direct (indirect) tax is a tax which can be shifted by the taxpayer onto the shoulders of some other person, as upon a buyer, mortgagor, or tenant."

In the course of the argument of Mr. Edmunds in the same case, while discussing the distinction between direct and indirect taxes, he was interrupted by Mr. Justice Brown, 457, 461, as follows:

> "Mr. Justice Brown: *Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else?*"

Mr. Justice Brown, in his dissenting opinion in that case, did not repudiate the true definition laid down by himself during the first argument, for he says in the opening of his opinion, 158 U. S., 686:

> "If the question what is and what is not a direct tax were now, for the first time, presented, I should entertain a grave doubt whether, in view of the definitions of a direct tax given by the courts

and writers upon political economy, during the present century, it ought not to be held to apply not only to an income tax, but to every tax, the burden of which is borne, both immediately and ultimately, by the person paying it."

Mr. Choate, in the course of his argument upon the first hearing, 157 U. S., 541, said:

"A tax on personalty has all the elements of a direct tax exactly as a tax upon real estate. It is directly imposed; it is presently paid; it is ultimately borne by the party owing it. There is no choice for him to escape from the tax *but to run away*. There is no volition about it, as there is in the case of any consumable commodities upon which excises are laid. Suppose a *direct* tax be levied upon real and personal property in the states, could a man whose personal property was touched by it, appeal to the court with any hope of success and say, 'that tax on my personal property is not a direct tax, but is an excise or a duty or impost. I will pay on my real property, but I will not pay and I shall appeal to the Supreme Court to free me from paying the portion of the tax that rests upon my personal property.' The court certainly would overrule such a contention. I say there is not the least distinction between such a case and that presented here."

This court, in that case, did come to the very conclusion which Mr. Choate, in his argument, indicated, and they adopted the definition of a direct tax urged by Mr. Choate.

It was held in the *Hylton* case and strenuously argued in the *Income Tax cases* that, while the meaning of the terms "direct and indirect taxes," as ordinarily used, is as above set forth, yet the term "direct tax" as used in our constitution, has a special and more restricted meaning, applying only to capitation taxes and taxes on land.

In the *Income Tax case* the Chief Justice devotes ten

pages of the opinion (157 U. S., 558 to 568) to showing that there is nothing in the history of the debates preceding the adoption of the constitution which warrants the statement that the term "direct tax" was used in the constitution with any such narrow and restricted meaning.

He concludes his historical references wi h these words (p. 568):

> "From these references, and they might be extended indefinitely, it is clear that the rule to govern each of the great classes into which taxes were divided, was prescribed in favor of the commonly accepted distinction between them and of the taxes directly levied under the systems of the states. And that the difference between direct and indirect taxation was fully appreciated, is supported by the congressional debates after the government was organized."

In other words, as a matter of historical fact, the term "direct tax," as it appears in the constitution, was used in the ordinary and obvious meaning which the term naturally conveys and with reference to the commonly accepted distinction between them and indirect taxes.

That this is the proper method of construing the Federal constitution appears from the following decisions:

Chief Justice MARSHALL said, in *Gibbons* v. *Ogden*, 9 Wh., 1:

> "As men whose intentions require no concealment generally embody the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed the Constitution and the people who adopted it must be understood to have embodied words in their natural sense and to have intended what they said."

And in *Rhode Island* v. *Massachusetts*, 12 Peters, 721, the Supreme Court of the United States said:

> "The solution of this question must necessarily depend upon the words of the Constitution. The meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states, together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which this court has already resorted in construing the Constitution."

This court, in *Martin* v. *Hunter's Lessee*, 1 Wh., 326, by Mr. Justice STORY, said:

> "On the other hand, this instrument (the Constitution), like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power if expressly given in general terms, it is not to be restrained to particular cases, unless the construction grows out of the context expressly, or by necessary implication. *The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.*"

It is a remarkable fact that between the year 1796, the year when the *Hylton* case was decided, and the year 1894, when the *Income Tax cases* were decided—in round numbers a hundred years—no definition was given by this court of a direct or indirect tax. Indeed, no definition was given in the *Hylton* case, but only instances were referred to when the tax would be direct or indirect, without any effort to tell why direct or why indirect. So in the cases following the *Hylton* case up to the *Income Tax cases*, no attempt was made to give a definition or to lay down a test for determining which class the tax fell into. This court called them direct taxes or excise taxes, but gave no reason why, the one or the other.

It seems now to be very clear that the definition given by Mill, and followed by the English courts and by this

court in the Income Tax cases, is not only scientific but accurate, viz: that is, a direct tax where the payment cannot be avoided or shifted, and that indirect tax when the burden can be shifted upon another by the person paying same, and when the intent of the law-making power was that it should be so shifted.

In the light of these definitions and decisions let us consider the nature of the act of Congress in question.

Whether the language imposes the tax upon the legacies or distributive shares as property, or whether it imposes such tax upon the right or privilege of taking by inheritance or will—the act of devolution to be measured by the amount or value of such legacies or distributive shares—in no manner changes the character of the tax if the result in either case be a direct tax upon the owner in respect to such legacies or distributive shares or in respect to such privilege or right of devolution.

If it be a privilege owned by anyone that is taxed it renders the same no less a direct tax in case the burden cannot be shifted upon some other person, and in case the law demands it of the owner and he is under a legal obligation to pay the same and cannot avoid such payment, either primarily or ultimately.

Is this a tax which is demanded of the legatee or next of kin "in the expectation and intention that he shall indemnify himself at the expense of another?"

This act of Congress makes this tax a legal demand or obligation against the legatee or next of kin, and it makes the same a *lien*, not only upon the property so taxed belonging to him, but also makes it a *lien* upon his real estate derived from the testator, and he cannot escape the obligation or throw it upon some other person; he can-

not abandon the property "or run away" as Mr. Choate puts it in his argument in the Income Tax cases, and thus discharge his liability.

Section 30 reads as follows:

> "That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years or until the same shall within that period be fully paid to and discharged by the United States and every executor, administrator or trustee, before payment and distribution *to the legatees or any parties* entitled to the beneficial interest therein, shall pay to the collector, or deputy collector * * * the amount of the duty or tax assessed upon such legacy or distributive share."

If the executor, administrator or trustee pay the tax he shall be "credited and allowed such payment before every tribunal and a decree or judgment may be obtained in any United States court and a sale of such property be made."

The legal obligation against such legatee or next of kin is complete and he cannot escape from it. The title is cast upon him by operation of law subject to all liens, and it is not voluntary with him to take or not take the same, but the obligation to pay attaches to him concurrently with the passing of the title. He cannot so use or dispose of the estate or privilege as to relieve himself or shift the burden. It is not possible to think of this tax as being indirect under any conceivable state of affairs. It cannot be indirect unless the circumstances show that the person who is ultimately to pay the tax cannot be ascertained. In the case at bar the legatee pays the tax both immediately and ultimately. It was not the intention of Congress that any other person than the legatee or distributee should ever pay such tax. It was not the

desire or expectation of Congress that any other person should ever pay the same. This tax cannot be indirect in its operation. The exact distinction betwixt a direct and an indirect tax always depends upon whether *the operation of such tax be direct or indirect.*

The court cannot force a definition by calling this tax an excise or duty, for that is assuming the thing to be proven—but assuming that it is an excise or duty in no manner proves that it is an indirect tax. We must not juggle with names but must look at the substance of things and not the form. As Mr. Chief Justice FULLER said in the Income Tax cases, 157 U. S., 581:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the constitution or of the rule of taxation and representation so carefully recognized and guarded in favor of the citizens of each state, but constitutional privileges cannot be thus evaded. It is the substance and not the form which controls."

To adopt any such principle of construction, any law, however manifestly unconstitutional, can be upheld. Lord Chancellor SELBORNE (Sir Roundell Palmer) said, *supra*: "The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases, but the best general rule is to look to the time of payment and *if at the time the ultimate incidence is uncertain*" then it is indirect; otherwise direct.

Is there, in the case at bar, any possibility of doubt as to the ultimate incidence at the time of payment? Does it not fall at such time upon and only upon the legatee or distributee?

The test under the constitution is whether it is a direct tax, not whether it may be in the nature of an excise or

duty. (Who knows exactly the definition of an excise or duty?) The constitution provides that all direct taxes shall be apportioned among the several states. (Art. 1, Sec. 2, Par. 3; also Art. 1, Sec. 9, Par. 4, Const. U. S.)

Whether it be a duty or excise, or in the nature of a duty or excise, is of no consequence, if it also be a *direct* tax it must be apportioned.

The definition of a duty or excise may not be easily expressed, but the definition of a direct tax, *when applied to the language of this act*, is simple and easy. The burden in this case cannot be shifted. It falls immediately and ultimately upon the legatee or distributee. It was the intention and expectation of Congress in the present case that it should fall upon and be paid by the legatee or distributee. To avoid the provision of the Constitution the court is not permitted to call it an excise or duty, for in calling it so we do not escape the fact that it is direct in its character.

This court expressly decided this point in the Income Tax cases, 158 U. S., 622, where Mr. Chief Justice FULLER said:

> "It is said that a tax on the whole income of property is not a direct tax in the meaning of the Constitution, but a duty, and as a duty leviable without apportionment, whether *direct or indirect*. We do not think so. Direct taxation was not restricted in one breath and the restriction blown to the winds in another."

So we gain nothing in this case by discussing the definition of duty or excise or impost, for if it be a duty or excise or impost it must still be apportioned in case it be direct in its operation. The chief justice further said (p. 627):

> "The Constitution prohibits any direct tax un-

less in proportion to numbers as ascertained by the census; and in the light of the circumstances to which we have referred is it not an evasion of that prohibition to hold that a general unapportioned tax, imposed upon all property owners as a body, for or in respect of their property, is not direct in the meaning of the Constitution because confined to the income therefrom?

"Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and *with no possible means of escape from payment*, so belonging to a totally different class from that which includes the property from whence the income proceeds?"

Nor can a distinction be taken between a tax upon tangible and intangible property, between a thing in possession and a thing or chose in action. A duty or excise may be levied upon tangible property, such as imported goods and manufactured articles, such as beer and whiskey—and a direct tax may be levied upon rights or choses in action, such as investments of income in securities. (158 U. S., 635.

A franchise, a license, a privilege, a right to do business, all constitute property of which a party cannot be deprived except by due process of law. The privilege of inheritance is property, and as such taxable within the limitations of the Constitution. But whether a tax so levied upon such rights and privileges is direct or indirect does not depend upon the character of the property taxed, but upon the ultimate incidence of the tax. It depends upon whether the burden can be shifted upon

another or must be paid both immediately and ultimately by the party charged therewith, and by the party who Congress intended and expected should bear the same.

It must be admitted that there is some confusion in the cases decided by this court, and in some of them there are expressions difficult of explanation, but we think they all arise from a somewhat negligent following of this early decision in *Hylton* v. *United States*, 3 Dall., 171.

It is not clear that this court in the Income Tax cases intended to overrule that decision in all its parts. It is certain, however, that this court did overrule the conclusions drawn from that case, and indulged in by counsel and also by this court in some of the cases as to the right to tax personal property without apportionment. If any portion of the decision in that case remains unchallenged by the decision in the Income Tax cases it is that portion only which permits the taxation of the use and expense of such property, the payment of which is capable of being shifted upon some other person, as, for instance, carriages owned for hire. The expense of such carriage and the tax thereon might be shifted upon the person hiring the same, so, it being possible that all persons owning carriages would use them for hire, the taxation of such use would be an excise and the amount of such tax could be shifted upon the person hiring the same. But where it would not be possible under any circumstances to shift such tax upon another, as in the case at bar, it would be a direct and not an indirect tax, nor would it be an excise.

In the *Hylton* case it might be considered from the nature of the article taxed, namely, a vehicle for transportation for hire, that it was a tax upon the use of it. In

other words, the tax upon the carriage was considered a tax upon its consumption or use. If it had been considered in that case that the tax should abide with the person who paid it, it would not have been considered as an indirect tax, but as the owner thereof had the power to shift such tax upon the hirer or person using the carriage, it was considered indirect. The language of the justices deciding the *Hylton* case is certainly remarkable in its uncertainty of meaning, and this court in the Income Tax cases never intended to affirm the decision in that case, *but by implication overruled the same and distinctly held that a tax levied upon personal property as such and that could not be shifted upon another was a direct tax.*

The chief justice reviews very carefully the *Hylton* case, 168 U. S., 623 to 628, and the views of Mr. Hamilton as expressed in the Federalist and in his argument in the *Hylton* case and the views of the various judges.

The chief justice quotes from the 36th Federalist, written by Mr. Hamilton, as follows:

> "The taxes intended to be comprised under the general denomination of internal taxes may be subdivided into those of *direct and indirect* kind. * * * As to the latter, by which must be understood duties, and excises on articles of consumption, one is at a loss to conceive what can be the nature of the difficulties apprehended."

Whether the explanation given by the chief justice as to the meaning of the *Hylton* case was satisfactory or not, the court did hold that a tax levied upon personal property as such, and which could not be shifted upon another, was a direct tax.

This is the language used in the 158 U. S., 628:

> "Nor can we perceive any ground why the same

> reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom. All the real estate of the country and *all its invested personal property* are open to the direct operation of the taxing power if an apportionment be made according to the constitution. The constitution does not say that no direct taxes shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power or any reason why an apportioned direct tax cannot be laid and assessed as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, 'upon the same objects of taxation on which the direct taxes levied under the authority of the state are laid and assessed.' "

The views of this court, as expressed in the *Income Tax* cases, upon this subject, are not uncertain, although the court was not unanimous; but the court as such recognizes that a direct tax may be laid upon anything called personal property, be it tangible or intangible, be it in possession or in action, which proposition is in direct contravention of the decision in the *Hylton* case, and hence the authority of the *Hylton* case has ceased to be controlling. It must, therefore, be considered that this court is committed to the definition that those only are indirect taxes which may be shifted upon another and which Congress both intends and expects to be so shifted, and those are direct taxes which are "imposed merely because of ownership and with no possible means of escape from payment"—158 U. S., 625, 628, and the cases heretofore cited. And hence the decision of the *Hylton* case is either overruled or is so modified as to conform to the definitions above given.

The tax so imposed by this act falls clearly within the

definitions above given, and if there be any remaining dispute as to what, under all circumstances, constitutes a direct or an indirect tax, the facts in this case necessarily exclude any dispute, inasmuch as it clearly falls within any definition known or given, either by economists or courts, as to the meaning of a direct tax. Having now reviewed and ascertained the true definition of direct and indirect taxes so far as a definition can be given, let us now refer to the decisions subsequent to the *Hylton* case, and prior to the decision of the Pollock case, all of which are more or less based thereon.

The case of *Pacific Insurance Co.* v. *Soule*, 7 Wall., 433, arose under the Internal Revenue Act of 1864, wherein a certain tax was levied upon amounts insured, renewed or continued by insurance companies, based upon the gross amount of premiums received and assessments made therefor, and a tax also upon dividends, undistributed sums and income. The question arose as to the constitutionality of that statute, such tax not being apportioned among the states. It was contended on behalf of the insurance company that it was a direct tax, and on behalf of the government that it was an indirect tax, and the *Hylton* case was referred to by the government's counsel as decisive of the question. Justice SWAYNE delivered the opinion and quoted from the opinions of the justices in the *Hylton* case.

The court, after stating the case, said:

> "If a tax upon carriages kept for his own use by the owner is not a direct tax, we can see no ground upon which a tax on the business of an insurance company can be held to belong to that class of revenue charges."

The foregoing is substantially the entire argument of the court. The argument *ab inconvenienti* is also

referred to, which does not seem to add anything to the strength of the argument, excepting that a direct tax would rarely, if ever, be levied at the present day upon personal property. That is a political argument with which this court has nothing to do. Notwithstanding the decision in that case is based entirely upon the authority of *Hylton* v. *United States*, there is in our mind a much better reason in support thereof, viz., that the tax is indirect for the reason that the burden thereof can be shifted by the insurance company upon the persons whom they insure, just as a stamp duty required to be paid by a person conveying real estate can be shifted upon the purchaser, and just as the tax for a license or upon an authority to do business may be shifted upon the customers of the parties.

It is not the question whether it may be wholly shifted, but in the nature of things a large part and probably the whole amount of the cost of such tax could be shifted upon the persons voluntarily dealing with such insurance company, and hence that tax clearly falls under the definition of an indirect tax, viz., where the person upon whom it is levied may recover the amount by means of advance in premiums for such insurance. In other words, it is an indirect tax in that case because it is demanded from one person, viz., the insurance company, in the expectation and intention that such company shall indemnify itself at the expense of the insured. Such a tax is clearly an excise and indirect tax, not upon the basis of the decision in the *Hylton* case as was determined by the court, but on account of the nature of the tax itself being indirect, and because it cannot be made to rest immediately and ultimately upon the person taxed any more than a tax upon beer manufactured can be made to rest

upon the brewer ultimately, as he may shift the same by adding the amount of the tax to the cost of manufacture, just as the insurance company can shift the tax by adding the amount of the same to the cost of insurance, and the person who deals with such insurance company voluntarily, therefore, pays the tax.

It must be so in the nature of things, because the insurance company, prior to the levy of such a tax, would fix its rates corresponding with such fact, and would not do business unless such rates were satisfactory. It would at once, in consequence of such a tax, raise the premium for the insurance, and thus force its payment indirectly by another person. It is added to the cost of the goods and the goods are then sold to the consumer, who buys the same voluntarily at such increased cost. The argument runs straight through, and in every instance where the tax can be shifted upon some other person, it is an indirect tax; and the *Soule* case was therefore properly decided, but an improper reason given for it.

In *Veazie Bank* v. *Fenno*, 8 Wall., 533, there was decided the constitutionality of an act of Congress passed July 13, 1866, which provides that every national banking association, state bank or banking association shall pay a tax of ten per centum on the amount of the notes of any state bank or state banking association paid out by them after August 1, 1866.

The Veazie Bank of Maine contended that such tax was a direct tax and, not being apportioned among the states, was unconstitutional. The case was argued by the Attorney General of the United States, relying upon the case of *Hylton* v. *United States*, 3 Dall., 171, and *Pacific Insurance Company* v. *Soule*, 7 Wall., 433.

Chief Justice CHASE delivered the opinion, and after setting out the history of the legislation of Congress touching the national currency, and also touching the subject of direct taxation, he said:

> "This review shows that *personal property*, contracts, occupations and the like have never been regarded by Congress as proper subjects of direct tax. * * * It may be rightly affirmed, therefore, that in the practical construction of the constitution by Congress, *direct taxes have been limited to taxes on land and appurtenances and taxes on polls or capitation taxes.*"

Then after discussing the views of Madison, King and others, he says:

> "All this doubtless shows uncertainty as to the true meaning of the term 'direct taxes;' but it indicates also an understanding that direct taxes were such as may be levied by capitation and on lands and appurtenances."

The chief justice then refers to the case of *Hylton* v. *United States*, and reviews the language of the justices, and then proceeds:

> "And it may further be taken as established upon the testimony of Paterson that the words 'direct taxes' as used in the constitution comprehended only capitation taxes and taxes on land and perhaps taxes on personal property by general valuation and assessment of the various descriptions of property within the several states. It follows necessarily that the power to tax without apportionment extends to all other objects."

The chief justice also quotes the case of *Pacific Insurance Company* v. *Soule*, which had been decided the previous year, adding so much force to the *Hylton* case.

The court then refers to the proposition that it was an attempt upon the part of the government to tax agencies

of the state government. Touching that proposition the chief justice said:

> "But in the case before us the object of taxation is not the franchise of the bank but the property created or contract made and issued under the franchise or power to issue bank bills. A railroad company in the exercise of its corporate franchises issues freight receipts, bills of lading and passenger tickets, and it cannot be doubted that the organization of a railroad is quite as important to the state as the organization of a bank, but it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the state which granted the charter to the railroad, and it seems difficult to distinguish the *taxation of notes issued for circulation from the taxation of these railroad contracts.* Both descriptions of contracts are means of benefit to the corporation which issue them; and both, as we think, may properly be made contributory to the public revenue."

It will be observed from the foregoing that the court did not attempt to state why a tax upon freight receipts, bills of lading or notes issued by a bank was indirect and not direct. The court only states it as a fact, but the reason why such taxation is indirect has heretofore been reviewed by us, and that reason is that such taxes are those which are demanded from one person or corporation in the expectation and intention that he shall indemnify himself at the expense of another.

The railway company or express company shifts or may shift the burden of the tax imposed upon the bill of lading or express receipt, by charging the person for whom it carries the article so much additional for the service. In that respect it is like a duty on foreign merchandise or a stamp upon a deed. It is added to the cost or price, and the person buying the merchandise or the real estate need

not purchase—it is voluntary with him—but if he does purchase he thereby pays the tax and it is so shifted upon him, just as we have heretofore explained in the case of the *Insurance Company* v. *Soule*.

The same can also be said in regard to the issue by a state bank of its notes, which the court in the last case refers to as being similar to the issue by a railway of its freight receipts or bills of lading.

The bank loans its notes or currency to a customer and takes back the obligation of the borrower at a certain rate of interest. In doing so it has the power to include the tax and add it to the interest. To be sure the tax in question was such that it practically destroyed the loaning by the bank of its notes to customers, because the tax was so great that no customer would pay the same and therefore it destroyed the currency of such bank of issue. Such probably was the intention of Congress, but the operation would be the same in case the bank had been able to loan its notes to anyone. It would have managed to recover the tax from the person borrowing. If it had been a reasonable tax of a half or one cent, it might not have destroyed the use of such state bank currency, just as the tax upon the national banks upon the currency issued by them is taxed at a small rate but not sufficient to destroy the use of such bank currency by the banks, although in point of fact it is known that many banks issue as little currency as possible on account of its unprofitableness resulting by reason of the government tax thereon. Nevertheless, wherever the national banks to-day issue their currency and pay the tax to the government, there is no doubt that the bank is enabled to shift the tax upon the persons dealing with it, and hence it cannot be said that the bank pays the tax

ultimately. Had the court in that case stated the reasons why the tax was indirect, instead of relying upon the *Hylton* case and *Soule* case, the decision would have been much more satisfactory. The judgment of the court, however, is undoubtedly correct that the tax is constitutional, but not for the reasons, in our judgment, stated in the *Hylton* case or even in the *Soule* case.

But upon reading the opinion of the Veazie Bank case it is clear that the court was not satisfied with the decision based upon the grounds already mentioned, but went on to state that under the constitution the power to provide a circulation of coin and the emission of bills of credit is given to Congress, and the court proceed to say

> "That there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description and convenient and useful for circulation. * * * Having thus in the exercise of undisputed constitutional powers undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionallysecure the benefit of it to the people by appropriate legislation. * * * To this end Congress may restrain by suitable enactment the circulation as money of any notes not issued under its own authority. Without this power indeed its attempts to secure a sound and uniform currency for the country must be futile."

So the court practically placed its decision upon another provision of the constitution, viz., the power to coin money and regulate the value thereof.

Art. 1, Sec. 8, Par. 5.

What the chief justice said in that case, however,

that no tax upon personal property could be direct, based upon the Hylton case, is overruled by the *Income Tax* cases. It being agreed, therefore, that a direct tax may be levied upon personal property, and when so levied must be apportioned among the states, the only thing to which a court is to look is to the character of the tax, whether it was intended to be direct or indirect, and if intended to be paid by the person against whom it was levied primarily and ultimately, without ability to shift the same upon another, then such tax is direct. This is the test, and not the question whether it be personal property or real property upon which the tax is levied.

The case of *National Bank* v. *United States*, 101 U. S., 1, is a decision upon the same provision of the act of 1866, levying a tax of 10 per centum upon all state bank issues, and the court confines itself simply to referring to the decision in *Veazie Bank* v. *Fenno*, and says "we think this case comes directly within the principles settled" in that case. But this court in that case, by Chief Justice WAITE, quotes from the decision in the *Veazie Bank* case only that portion relating to the power of the Congress to coin money and fix the value thereof, and says "that ground is a satisfactory one," and further says:

> "As against the United States a state municipality has no right to put its notes into circulation as money. It may execute its obligations, but cannot, against the will of Congress, make them money. The tax is on the notes paid out, *i. e.*, made use of as a circulating medium. Such a use is against the policy of the United States."

It will be observed in that case the court does not refer to the *Hylton* case as the basis of its decision, nor to the *Soule* case, but solely to that portion of the decision

in the *Veazie Bank* case with respect to the powers of Congress under that provision of the constitution relating to the coining of money and fixing the value thereof, and hence has no bearing whatever upon the decision of the question at bar, because it does not place the decision upon the ground that it is either a direct or an indirect tax.

In the case of the *Railroad Company* v. *Collector*, 100 U. S., 595, a question was raised as to the constitutionality of the law levying a tax upon corporations upon the interest paid by it upon its bonds.

Mr. Justice MILLER, in delivering the opinion, said:

> "As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action."

It is clear, therefore, that the court did not desire that what it said touching the facts of that case should be drawn into a precedent thereafter.

The court said:

> "That the manifest purpose of the law was to levy the tax upon the net earnings of such companies (railway companies),"

and that the easiest way to ascertain such earnings was by reference to the dividends declared or the interest paid on its funded debt, or carried to a reserve or other fund remaining in its hands.

The court also said:

> "Looking to these modes of distribution as the surest evidence of the earnings which Congress intended to tax, it was less liable to evasion than any other. The tax was imposed upon all of them. * * * The tax was not laid on the bondholder who received the interest, but on the earnings of the corporation which paid the interest."

The court does not refer to a single case nor give its reasons for considering it an indirect tax, but it is clear from what has hitherto been said touching the *Soule* case that such tax can be shifted upon the persons doing business with the railroad, and if a certain amount of earnings are necessary to enable a corporation to do business, then it must be presumed that, as in the case of a stamp upon a bill of lading, the tax so levied, while collected primarily from the corporation, is collected ultimately from the person doing business with the corporation which creates the earnings, and that such a tax was levied upon the earnings of railways by Congress in the expectation and with the intention that the corporation should indemnify itself at the expense of the person dealing with it.

It was simply another way of collecting taxes from the body of the community, just as the imposition of a duty upon foreign goods is added to the cost of the goods, and is ultimately paid by the consumer, or by the person purchasing the goods, and in the case of a railway by the person hiring the railway to transport its goods. That it is an indirect tax is perfectly obvious, and consequently the court's decision was correct.

The case of *Springer* v. *United States*, 112 U. S., 586, has been so fully reviewed by this court in the *Income Tax* cases, 157 U. S., 578, that we need not refer to it further than to say that the opinion thus concludes:

> "Our conclusions are that *direct taxes* within the meaning of the Constitution are only capitation taxes as expressed in that instrument and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty."

It is plain that this court in the *Income Tax* cases has

repudiated that construction of the constitution and has held that a direct tax may be levied upon personal property. The basis of that decision is clearly repudiated.

In the case of *Nicol* v. *Ames*, 173 U. S., 509, decided at the last term of this court, the tax sought to be impeached as unconstitutional was a tax authorized by this same act of June 13, 1898, upon the facilities made use of and actually employed in the transaction of business on boards of trade or exchanges of various kinds, which tax was separate and apart from the business, but was only upon the facilities made use of at particular places.

The language of the act is this:

> "Upon each sale, agreement of sale or agreement to sell, any products or merchandise at any exchange or board of trade, or any similar place, either for present or future delivery, for each one hundred dollars in value of said sale, or agreement of sale, or agreement to sell, one cent, and for each additional one hundred dollars, or fractional part thereof, in excess of one hundred dollars, one cent, provided that on every sale, or agreement of sale, or agreement to sell, as aforesaid, there shall b made and delivered by the seller to the buyer a bill, memorandum, agreement or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be a lawful stamp or stamps in value equal to the amount of the tax on such sale"

The opinion of this court was delivered by Mr. Justice PECKHAM. In the course of his opinion he said:

> "As a mere abstract scientific or economic problem, a particular tax might possibly be regarded as a direct tax, *when, as a practical matter pertaining to the actual operation of the tax, it might quite plainly appear to be indirect.* Under such circumstances and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of in-

> validating the tax, *in placing it in a class different from that in which its practical results would consign it.*"

This is an accurate and exact statement touching the question in controversy; that it is always incumbent upon the courts to look to the actual operation of the tax to see whether or not it is direct or indirect. If there even be a doubt about the person upon whom the ultimate payment of the tax is cast, then the courts will construe such a tax as indirect in order to sustain the constitutionality of the law; but if there be no doubt as to who will ultimately pay the tax, then there can be no escape from the conclusion that it is direct.

Lord Chancellor Selborne (Sir Roundell Palmer), in the *Attorney General* v. *Reed*, L. R. 10 Appeal Cases (Privy Council), 144, sustains this position. In that case every instrument offered in evidence in a law suit required a 10-cent (Canadian money) revenue stamp to be attached by the party offering the same, and the amount of such stamps was at the end of the lawsuit to be charged against the losing party as costs. It could not be told during the progress of the case and at the time of payment where the payment would finally rest, whether upon the plaintiff or defendant.

Lord SELBORNE said:

> "In most proceedings of a contentious character the person who pays it is a litigant expecting or hoping for success in the suit; and, whether he or his adversary will have to pay it in the end, must depend upon the ultimate determination of the controversy. The legislature, in imposing the tax, cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when

> it was exigible, or upon any one else. Therefore it cannot be a tax demanded 'from the very persons who it is intended or desired should pay it' ; for in truth that is a matter of absolute indifference to the intention of the legislature. And, on the other hand, so far as it relates to the knowledge which it is possible to have in a general way of the position of things at such a moment of time, it may be assumed that the person who pays it is in the expectation and intention that he may be indemnified; and the law which exacts it cannot assume that that expectation and intention may not be realized. As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumable incidence may be altered. An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between the parties determining who shall bear it. The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; *but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain*, then, as it appears to their lordships, it cannot, in this view, be called direct taxation."

This is a clear definition, and falls within the statement made by Mr. Justice Peckham in the opinion in *Nicol* v. *Ames*, *supra*. At the time of the payment of the tax for the facilities of doing business on a board of trade, it cannot be ascertained who will eventually pay that tax, whether it will be wholly borne by the seller or by the purchaser, but there being a possibility or a probability that it will finally be borne by the purchaser, then it is indirect, according to all the definitions. Before it can be a direct tax it must be certain at the time of payment that the burden cannot be shifted.

This is well illustrated in the opinion in the case of *Nicol* v. *Ames*, in the court below, where the late Justice Showalter delivered the opinion.

See *Nicol* v. *Ames*, 89 Fed. Rep., 144.

There, speaking of the taxation attempted upon such privilege, Justice SHOWALTER said:

> "For, while the privilege taxed is his own property, the patron or employer enjoys to some extent the benefit resulting from the use of the privilege, but this tax amounts in reality to an expense in transferring commodities from the producer to the ultimate consumer. *The latter, in the last analysis, foots the bill. The tax is absorbed in the ultimate costs and the consumer eventually pays it.*"

Mr. Justice PECHHAM, when that case came to this court, substantially lays down the same principle, where he says (173 U. S., 520):

> "It is also said that the tax is direct because it cannot be added to the price of the thing sold and therefore be ultimately paid by the consumer. In other words, that it is direct, *because the owner can not shift the payment of the amount of the tax to some one else.*"

This court necessarily held in that case that the tax there in question did not or might not ultimately fall upon the seller, and that it was an indirect tax because *it might not ultimately fall upon the seller*, but upon the consumer as part of the price paid by him.

This facility for selling upon the board of trade is of itself property. The tax levied was not an indirect tax because the property taxed was intangible property or a chose in action, but it was an indirect tax because the tax might be shifted upon the purchaser, as stated by Justice Showalter in the court below, and that the pur-

chaser or the consumer of the commodity sold would in all probability finally pay the tax. This is the true test and is in accordance with the opinion of Lord Chancellor Selborne; as well as that of Lord Hobhouse in the case of *Bank of Toronto* v. *Lambe*, L. R. 12 Appeal Cases (Privy Council), 575–581.

This court will not treat lightly a question of great constitutional importance, but at the same time it will not be led astray by any legal will-o'-the-wisp. Every author, every court, every writer upon political economy that we have examined, agrees upon a definition of a direct tax so far as this particular principle is concerned, viz., that when the ultimate incidence is clearly upon the person taxed and cannot be shifted to any other person, it is a direct tax. If there be any doubt as to his ability to shift the same, or if he may even shift the same under some circumstances, the court will not hesitate to treat it as an indirect tax, rather than to hold the law unconstitutional; but in the case at bar there is no possibility of pointing to any person who must eventually or possibly or probably pay the tax so imposed *other than the legatees or next of kin.*

This court in *Nicol* v. *Ames* conceded that a *tax for a license* to do a particular business or a tax upon a business itself so transacted is a tax upon the property so dealt in. Such is the undoubted law as established by the court in many cases.

Brown v. *State of Maryland*, 12 Wheat., 419.
Cook v. *Pennsylvania*, 97 U. S., 566.
Almy v. *California*, 24 Howard, 169.

In the case of *Cook* v. *Pennsylvania*, *supra*, *Justice*

Miller reviews in his masterly way all the decisions up to that date touching this proposition. It was held that in all such cases such an attempt to tax the right to sell property or to deal in property or to hold property is a tax upon the property itself. In *Almy* v. *California*, above cited, the court holds that a stamp upon a bill of lading is an indirect tax upon the person so receiving the article shipped and not a direct tax upon the shipper who originally makes the consignment, and for the reason that the person making the payment for the stamp can shift it ultimately upon the receiver or consumer.

And in the case of the *State Freight Tax*, 15 Wall., 232, *Mr. Justice Strong* says:

> "The case presents the question whether the statute in question so far as it imposes a tax upon freight taken up within the state and carried out of it or taken up outside of the state and delivered within it, or in different words, upon all freight other than that taken up and delivered within the state, is not repugnant to the constitution of the United States."

It was argued that the tax was one upon the business and franchises of the railroad companies which were required to pay it. But the court reviewing the authorities said:

> "The inquiry was upon whom did the burden really rest and not upon the question from whom the state exacted payment into its treasury."

The *Income Tax* cases also hold that a tax upon the income is a tax upon the property from which the income is derived.

The court says in *Nicol* v. *Ames*, *supra*, that the tax levied was upon the privilege, opportunity or

facilities offered at boards of trade or exchanges for the transaction of the business mentioned, and that it was not a tax upon the business itself which is so transacted. And while it concedes that the tax levied upon a privilege or permission to do business or upon the business itself is a tax upon the property, yet it says that a tax upon such facility made use of is not a tax upon the property transferred.

This statement may be seriously doubted; but if it were conceded to be true, nevertheless, the facility itself is property in its broadest sense, of which a party could not be deprived without due process of law; and taxation on such facility is an indirect tax, not for the reason that it is a facility or privilege, but for the reason that the burden of such tax may be shifted upon another person and is finally paid by the consumer of the article sold by reason of the facility offered. *This is what made the tax upon such facility an indirect tax or excise or duty and not the fact that the facility taxed was an intangible thing.*

We make no progress by calling a certain tax an excise or a duty and therefore an indirect tax, because before we can ascertain whether it is an excise or a duty we must also ascertain whether it is an indirect tax, because if it be classed as a direct tax then it cannot be classed as an excise, or duty, properly speaking.

This court in *Nicol* v. *Ames*, *supra*, said:

> "It is also said that the tax is direct because it cannot be added to the price of the thing sold, and therefore ultimately paid by the consumer. In other words, that it is direct because the owner cannot shift the payment of the amount of the tax upon some one else. *This, however, assumes, that the tax is not in the nature of a duty or an excise, but that*

> *it is laid directly upon the property sold*, which we hold is not the case. It is not laid upon the property at all, nor upon the profits of sale thereof, nor upon the sale itself, considered separately and apart from the place and circumstances of the sale."

It seems to us in the foregoing sentence that this court reasons in a circle, because it *assumes* that the tax in that case was in the nature of *a duty or an excise* and therefore was an indirect tax. But, as a matter of fact, in that case it was an indirect tax and for that reason was in the nature of a duty or an excise. It seems to us the court there treats the *effect as the cause* and *the cause as the effect*, because no tax can be a duty or an excise unless it be indirect in its character.

You cannot define a duty or an excise except by ascertaining whether it is direct or indirect. Such facilities for doing business at a particular place are property, although not of the same character as the wheat or corn sold, but nevertheless it was a tax upon property and it was properly held to be in the nature of an excise or duty, but the reason of its being an excise or duty was that it could be shifted upon the purchaser or final consumer, and would not or might not rest primarily and ultimately at the time of payment upon the seller. There can be no definition of an excise or duty which does not embrace the idea that the tax is added to the article sold and that the whole is finally shifted, or may be shifted upon and paid by the person acquiring the article. concerning which the facilities existed.

There is nothing illusive in the definition of a duty or an excise, but it must always be tested by ascertaining whether the same may ultimately fall upon, or be paid by, another person. If it does not, it is a direct tax; if it does,

it is indirect, and is then an excise or duty. So the decision in *Nicol* v. *Ames* in no manner changes the character of the privilege taxed in this case, if it be a privilege, or the right to inherit, that is taxed, and not the legacies or distributive shares themselves; and that case in no manner militates against our position in this case, because in this case the tax levied, whether it be upon the privilege or upon the property, is not indirect inasmuch as it cannot be shifted upon any other person, but is a direct tax upon such property, be it a privilege or be it a legacy. A privilege or a right is of precisely the same value as the thing procured by reason of such privilege or right, and constitutes property to the same extent.

A tax on the right to inherit is a tax on the enjoyment of the inheritance, and a tax on the enjoyment of the inheritance can be paid only by the one enjoying it, and can never be cast upon another.

The same is true if the tax is on the legacy instead of the privilege. Whichever theory of the tax is adopted, it is not an indirect tax.

The case of *Scholey* v. *Rew*, heretofore referred to, is based upon the *Hylton* case and the case of *Insurance Co.* v. *Soule*, *supra*. In that case, this court by Justice Clifford, held that the tax was upon the succession or right to inherit the real estate, and consequently that it was not a tax or duty on land, nor a capitation tax, and, therefore, in accordance with the *Hylton* case, it was an excise and indirect tax. We concede that a tax upon the succession or devolution of real estate would not be a tax upon real estate but it would be a tax upon personal property, such right or devolution being personal property. The court

in that respect followed the *Hylton* case and held it to be an indirect tax, saying also:

> "Whether direct taxes in the sense of the constitution comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term *does not include the tax on income which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy.*"

But this court now holds in the *Income Tax* cases that a direct tax can be levied upon personal property, and that an income tax is unconstitutional and void, and hence not only the authorities but the reasoning and conclusions in *Scholey* v. *Rew* are without foundation, and that case is not controlling but has been overruled by the *Income Tax* decision.

It is perfectly apparent in the *Scholey* case that the person subjected in the first instance to the tax could not shift the burden upon any other person, and hence it could not under the decisions since made be held an indirect tax.

Under our second point we have shown that *successions* or the right to inherit are creations of the state government under its reserved powers, and that laws passed by the state legislature to carry into execution the powers vested in the state government cannot be retarded, impeded, burdened or controlled by the federal government, and hence the right of succession granted by the state government is a right which cannot be taxed by the federal government.

The court, in its decision in *Scholey* v. *Rew*, *supra*, entirely overlooked this constitutional principle which was apparently not in the mind of the court in that case and for that reason the decision is to be disregarded.

IV.

If it be held to be an indirect tax then the law violates the constitutional rule of uniformity in the following respects:

(*a*) *That it imposes a tax progressive in its nature;*

(*b*) *That it discriminates among persons in the same class;*

(*c*) *That it creates exemptions in favor of private individuals and for private purposes and not for any public use or benefit.*

It is in contravention of Par. 1, Sec. 8, Art. 1, of the constitution, which provides that "All duties, imposts and excises shall be uniform throughout the United States," and also in contravention of the spirit of the fourteenth amendment, which provides: "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor to deny to any person within its jurisdiction the equal protection of the laws."

The act in question creates classes of persons who are to be taxed at a certain rate according to the amount of the legacies or distributive shares received by them, which is to vary according to the *amount of the estate* out of which such legacies or distributive shares are to be paid; that is, a person receiving a legacy of five thousand dollars out of an estate of twenty-five thousand dollars, and who stands in a certain relation to the decedent, is to be taxed less than if he received a legacy of five thousand dollars out of an estate of one hundred thousand dollars or out of an estate of five hundred thousand dollars, or out of an estate of one million dol-

lars, the rate varying in each instance according as the size of the estate out of which it is to be paid varies.

The statute reads as follows on this subject:

"Sec. 29. * * * Where the *whole amount* of said personal property shall exceed in value ten thonsand dollars and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

"*First.* Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestors, brother or sister, of the person who died possessed of such property as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

"*Second.* Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

"*Third.* Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother or a descendant of a brother or sister of the father or mother of the person who died possessed as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

"*Fourth.* Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

"*Fifth.* Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or

shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest, *provided:* that all legacies or property passing by will or by the laws of any state or territory to the husband or wife of the person who died possessed as aforesaid, shall be exempt from tax or duty.

"Where the amount or value of such property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half, and where the amount or value of such property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of such property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half, and where the amount or value of such property shall exceed the sum of one million dollars such rates of duty shall be multiplied by three."

It will be seen, therefore, that each of the above five classes is subdivided into four classes, based upon the value of the whole amount of the personal property of the deceased when more than $25,000, regardless of the amounts of the individual legacies. The classifications clearly are based upon the value of the *whole* personal property of the deceased, and not upon the value of the legacies.

Secretary of the Treasury Gage, and Mr. Scott, the Internal Revenue Commissioner, as I understand, have so held. Thus, a child receiving a legacy of $5,000 out of its father's estate, which is of the value of $25,000, pays a tax of $37.50; a child receiving a legacy of $5,000 out of the estate of its father, which is of the value of

$100,000, pays $56.25; if he receives $5,000 out of the estate of his father, which is of the value of $500,000, he pays a tax of $75; if he receives $5,000 out of the estate of his father, which is of the value of $1,000,000, he pays a tax of $93.75; and if he receives a legacy of $5,000 out of the estate of his father, which is of the value of over a $1,900,000, he pays a tax of $112.50.

Take a stranger in blood, if he should receive a legacy of $5,000 out of an estate of the value of $25,000, he pays a tax of $250; if he should receive $5,000 out of an estate worth $100,000, he pays a tax of $375; if he should receive $5,000 out of an estate of $500,000, he pays a tax of $500; if he receives $5,000 out of an estate of the value of $1,000,000, he pays $625; and if he should receive $5,000 out of an estate of over $1,000,000, he pays a tax of $750.

So it is clear that there is no uniformity in the same class, and this want of uniformity is not based upon any reasonable grounds or difference in circumstances; that the difference in the tax between the persons receiving the same legacy does not bear a just relation to the attempted classification, and is a mere arbitrary selection. No reason occurs to us why persons receiving the same amount of legacy or distributive share, standing in the same relation to the testator, should be taxed differently, and not uniformly.

Suppose the value of A's personal property to be $25,000, and the value of B's $2,000,000.

C, a stranger in blood, receives a legacy of $10,000 from A's estate.

D, a stranger in blood, receives a legacy of $10,000 from B's estate.

The tax on C's legacy is $500.

The tax on D's legacy is $1,500.

The legatees receive the same amount. There is no relationship between the parties. They possess the same privilege and to the same extent, but one pays three times as much as the other.

A stronger illustration of the inequality of this law is the following: If the value of A's personal estate be $10,000, and his real estate be $2,000,000, the whole estate being $2,010,000 and the whole of his personal estate were bequeathed to C, a stranger in blood, C receives a legacy of $10,000 without payment of any tax, whereas, if B's estate were altogether personal property, and were worth $2,010,000, and D, a stranger in blood, receives a legacy of $10,000, the same amount as C, he would be compelled to pay a tax thereon of $1,500.

Both C and D in such case each receive a legacy of $10,000. Both are strangers in blood. One pays no tax, and the other pays a tax of $1,500.

The same illustrations above used held good throughout all the classifications. There is no escape from the conclusion that Congress intentionally discriminated, and that the purpose of Congress was to make a large estate pay a higher rate than a small one. Certainly if it be a tax upon the estate of the deceased, then it is not uniform according to the amount of the estate, and if it be a tax upon the legacy or distributive share received by persons standing in the same relation to the decedent, then the tax is not uniform.

It seems to us that these classifications are based upon "mere arbitrary selection," and that the property in either instance is not taxed according to the same rate,

and that a discrimination is made which creates a want of uniformity within the meaning of the constitution.

The Illinois Inheritance Tax Law lays different rates upon legacies to strangers, depending upon differences in amount of the legacies. For instance, upon a legacy of $10,000, the tax is $300; on a legacy of $20,000, the tax is $800; on a legacy of $50,000, the tax is $2,500, and on a legacy of $100,000, the tax is $6,000. The Illinois law was upheld by this court in *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S., 289.

It will be noticed in the Illinois law the classifications are based upon the value of the individual legacies (the privilege enjoyed) and not as in the Federal law upon the value of the whole estate left by the testator. It was claimed by the opponents to the Illinois law that the classifications were arbitrary.

Mr. Justice McKENNA said:

> "The tax is not on money, it is on the right to inherit, and hence a condition of inheritance, and it may be claimed, according to the value of that inheritance. The condition is not arbitrary, *because it is determined by that value* * * *."

Had this court held that the rate of the tax was regulated by the value of the whole estate (as was contended by counsel for Mrs. Magoun), instead of by the value of the legacy, or distributive share, it cannot be doubted that the law would have been held to be invalid, for the principle of uniformity requires that one man's property shall be taxed at the same rate as another man's property, and it was only supported upon the ground of the right of classification of the legacies received, and that after the classification was made the tax would then be equal *upon all falling within that classification.* It

seems that there are fifteen states now that have inheritance-tax laws, and in all such statutes the classifications are based upon relationship or want of it, and upon the value of the legacies. In none of them is it based upon the value of the whole estate—in none of them is such tax made progressive. No state legislature has ever attempted to pass such an arbitrary law, with the exception of Ohio, and the Supreme Court of Ohio, in *State* v. *Ferris*, 53 Ohio St., 314, held such statute to be invalid.

The statute in that case provided for progressive taxation, the same as the statute in question, namely, that a certain amount should be exempt, and next, that a legacy of the same amount received by persons standing in the same relation should be taxed more if the estate were large and less if it were smaller; that is, when the estate exceeds fifty thousand dollars and does not exceed a hundred thousand dollars, the tax was made one and one-half per cent. upon the legacy or distributive share, and when it exceeded a hundred thousand dollars and did not exceed two hundred thousand dollars, the tax was made two per cent. upon the legacy or distributive share, and when the estate exceeds two hundred thousand dollars and does not exceed three hundred thousand dollars, the tax should be three per cent. upon such legacy or distributive share, and so on, legacies of the same amount paying different rates according to the size of the estate out of which they were to be paid.

The court in that case held that the state had the power to tax the right of inheritance, but that the law in question was unconstitutional for two reasons, namely, the exemption of $20,000 from taxation and the increase of the per cent. as the value of the estate increases. 53 O. St., 357.

The court said (p. 336):

"The right to receive the first $20,000 of an estate not exceeding that sum is protected from taxation, while the right to receive the first $20,000 of an estate exceeding that sum is taxed the sum of $200. This is not equal protection. *Again, the right to receive $50,000 worth af property of an estate not exceeding that sum is taxed $500, while the right to receive $50,000 of an estate exceeding that sum is $750. This is not equal protection. The same may be said of other gradations provided for in the statute.*"

In *Gulf, Col. & Santa Fe* v. *Ellis*, 165 U. S., 150, Mr. Justice BREWER delivered the opinion of the court (p. 155), and said:

"But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of denial of equal protection. While as a general proposition this is undeniably true (citing cases), yet it is equally true that such classification cannot be made arbitary. The state may not say that all white men shall be subjected to the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or *all men possessed of a certain wealth.* These are distinctions which do not furnish any proper basis for the attempted classification. *That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrary and without such basis.* * * * 'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. *The differences which will support class legislation must be such as in the nature of things furnish a reasonablè basis for separate laws*

> *and regulations.* Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will contend that competency to contract may be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land.' "

Justice BREWER then proceeds:

> "But arbitrary selection can never be justified by calling it classification. * * * No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice MATTHEWS, speaking for this court in *Yick Wo* v. *Hopkins*, 118 U. S., 356, 369: 'When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

The court then quotes from the decisions of several other states and we call attention to what he says in regard to the decisions in Illinois. He proceeds (p. 164):

> "*Millet* v. *People*, 117 Ill., 294, in which an act of the legislature requiring owners and operators of coal mines to weigh coal in a certain specified manner, was held invalid, as beyond the power of the legislature to single out certain individuals and impose upon them burdens not imposed upon all. *Frorer* v. *People*, 141 Ill., [illegible], where an act which prohibited persons engaged in mining or manufacturing from keeping a store for furnishing supplies to their employes was held in conflict with the constitution. *Braceville Coal Co.* v. *People*, 147 Ill., 66, where a like ruling was made in respect to a

> statute requiring certain specified corporations to pay the wages of their employes weekly. *Eden v. People*, 161 Ill., 296, which set aside a statute forbidding barbers, and barbers only, to keep open their shops or work at their trade on Sundays. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection."

There are many other cases in this court laying down the same principle.

See

Bell's Gap R. R. v. *Pennsylvania*, 134 U. S., 232.
Giozza v. *Tiernan*, 148 U. S., 657.
Kentucky R. R. Tax cases, 115 U. S., 321.
Hallinger v. *Davis*, 146 U. S., 314.
Barbier v. *Connolly*, 113 U. S., 27.
Mugler v. *Kansas*, 123 U. S., 623.
Magoun v. *Illinois Trust and Savings Bank*, 170 U. S., 283.
In re Greice, 79 Fed. Rep., 627.
Railroad Tax cases, 13 Fed. Rep., 722.

The *Magoun case, supra*, construed the Illinois inheritance tax, and this court, by Mr. Justice McKENNA, in that case stated in no uncertain tone the doctrine for which we contend and which seems to us decisive of the case at bar.

It is as follows:

"The clause of the Fourteenth Amendment

> especially invoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be *applied impartially to all the constituents of a class* so that the law shall operate equally and uniformly upon all persons in similar circumstances.' * * * *It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.* * * * The rule * * * only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, *but on persons according to their relations.* In some circumstances it may not tax A more than B; * * * in other words, the state may distinguish, select and classify objects of legislation. * * * It is not without limitation, of course. '*In all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.*'
>
> "* * * If the law operates 'equally and uniformly upon all persons in similar circumstances' * * * *it requires that the law imposing it shall operate upon all alike under the same circumstances.*"

Does this law operate equally and uniformly upon all persons in similar circumstances? Does it operate on all alike under the same circumstances? We have pointed out that Congress has created a classification and has imposed a tax at different rates upon persons within the same class and upon persons under the same circumstances. Persons, for instance, receiving $5,000 of a legacy or distributive share, who stand in the same relations to the testator or intestate, are taxed more under same circumstances than others of the same class.

We admit that the decisions above referred to were all delivered in the construction of the operation of the Fourteenth Amendment. While it may not be true that the Fourteenth Amendment, as such, has binding force upon the Congress of the United States, nevertheless, Par. 1, Sec. 8, Art. 1, of the Constitution of the United States asserts the same principle of equal protection as follows:

> "*That all duties, imposts and excises shall be uniform* throughout the United States-"

Congress is necessarily controlled by this provision in all its legislation, and all duties, imposts and excises must be uniform throughout the United States; and this article has the same significance in its operation upon the general government that the Fourteenth Amendment has upon the state governments, that is, that every person within the jurisdiction of the general government is entitled to the equal protection of the laws—they shall be uniform in their operation so far as taxation is concerned.

So that we do not perceive that the decisions under the Fourteenth Amendment are not strictly applicable to the clause of the constitution just referred to. The court is created especially for the purpose of maintaining the limitations of the Constitution of the United States.

Mr. Justice HARLAN, in *Mugler* v. *Kansas*, *supra*, said:

> "There are of necessity limits beyond which legislation cannot rightfully go. While, if possible, presumption is to be indulged in favor of the validity of a statute * * * *the courts must obey the constitution rather than the law-making department of the government*, and must, upon their own responsibility, determine whether, in any particular

case, these limits have been passed. 'To what purpose,' it was said in *Marbury* v. *Madison*, 1 Cranch, 137, 176, 'are powers limited and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.''

If this court will now look into the substance of this act, we think it will perceive that Congress has passed the limit fixed by the constitution, and has undertaken to create a tax which does not operate uniformly throughout the United States, but taxes one person more upon the same object than it taxes another, occupying the same relation and under the same circumstances.

Moreover, a classification made by the state legislature regarding a rule of descent cannot be made use of by the Federal government to support this law, because of the want of power in the Federal government to create rules of inheritance. A classification made by the state, which may be reasonable, owing to the power of the state to enact rules of descent and grant privileges, may be most arbitrary and unreasonable when adopted by the Federal government, which lacks such power.

We may also ask in this connection. can the general government create a classification of subjects to be taxed which have an existence under the legislation of the state and which would not exist as a subject to be taxed, but

for the power exercised by the state legislature? Can the general government make a different classification for the purpose of taxation of the same subject than the one made by the state legislature which created the right or granted the privilege so sought to be taxed? We contend that no such power exists in the general government. It has no power to legislate upon the question of inheritance, and hence it has no power to classify such rights for the purpose of taxation in a different way than they have already been classified by the state. This proposition does but involve the previous proposition discussed by us, namely, that the general government cannot in any manner *retard, impede, burden, abridge or otherwise control the operation of state laws or the powers of the state government.*

The Federal government has no power over such a subject and cannot create it and cannot destroy it by taxation or otherwise, and it cannot create classes out of such privilege for purposes of taxation, as the state may do. Such privileges have no existence, except as granted by the states, and the general government cannot arrange such privileges into classes different from what the state has arranged. We have no doubt that the general government may arrange classes of property which exist of *common right* for the purpose of taxation, but it cannot arrange into classes property which exists only by virtue of the grant of the legislature of the state government. This interferes with the power of the state government, as shown under point II.

(*b*) Not only are sections 29 and 30 of the act in question unconstitutional because of the progressive

character of the tax, but also on account of the exemption of all legacies to be received from the estates of the value of ten thousand dollars or less.

Exemptions can be legally allowed to individuals or corporations where the same are of some benefit to the public, as, for instance, the exemptions of churches and charities, and of persons who are entitled to pensions or to some compensation on account of public service rendered, or to protect families from poverty and to prevent such indigent parties from becoming a public charge;—or where the collection of the tax upon such property exempted would cost more than the tax levied, as in cases of poor people where the tax is small and the expense connected therewith large—the same as exemptions from executions of a small amount of property belonging to a poor person,—and such exemptions must therefore be based upon the peculiar relations of the parties to the community, and not arbitrarily.

Legacies are exempted by the statute in question not on account of the relation of the parties to the decedent, nor for any public purpose, but arbitrarily. Such classification is not "based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification," but is a mere arbitrary selection, not based upon any reason.

Why should a person, for instance, who is a "stranger in blood, or a body politic or corporate," that receives a legacy of \$5,000 or \$10,000 out of a personal estate of the decedent of the value of \$10,000 be not taxed, while a "stranger in blood, or body politic or corporate," that receives a legacy of \$5,000 or \$10,000 out of an estate of more than the value of \$10,000, is compelied to pay a tax?

This law does not operate "equally and uniformly upon the persons in similar circumstances." The "stranger in blood, or body politic or corporate," are in similar circumstances in both cases, and it is a mere arbitrary distinction which taxes one and not the other. The party receiving the legacy in both cases may be of the same financial standing. They may both be rich or in good circumstances, and yet the exemption is allowed to one and not the other. The exemption is not based upon the idea that the person receiving the legacy is not able to pay the tax, or that the public would be in any way benefited, or that the state owes a duty to such individual which can be presumed by allowing such exemptions.

This same reasoning applies to the exemption of the widow, no matter what the size of the estate.

Judge COOLEY, in his work on Constitutional Limitations, 5th Ed., *p. 515, says:

> "The power to determine the persons and objects to be taxed is trusted exclusively to the legislative department; *but over all those objects the burden must be spread or it will be unequal and unlawful as to such as are selected to make payment.*"

And in his work on *Taxation*, p. 214, 215, Judge COOLEY says:

> "An exemption, it would seem, in order to be admissible ought to be either made on the basis of contract, in which case the public is supposed to receive a full equivalent therefor, or it ought to be made on *some ground of public policy*, such as might justify a pension or a donation of the public funds on some general rule all of which come within it may have the benefit; or such as, at least, makes the public at large interested in encouraging or favoring the class or interest in whose behalf the exemption is

made. *It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or a single article of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor.* Such favoritism could make no pretense to equality; it would lack the semblance of legitimate tax legislation. * * * The motives of the exemption or the beneficial purposes expected to be accomplished by it can make no difference. No man is obliged to be more generous than the law requires; *each may stand strictly on his legal rights, and refuse to submit to any exaction that purposely is made more burdensome to him than the rules of law permit.* The legislature is equally powerless if the constitution has prescribed a rule of equality which forbids exemptions. Such a rule, it has been seen, is prescribed by the constitutions of some of the states, which, in terms or by necessary implication, require all private property in the state to be taxed in proportion to its value."

The rule of equality of the United States constitution, "that all duties, imposts and excises shall be uniform throughout the United States," forbids such exemptions.

In *Sutton's Heirs* v. *City of Louisville*, 5 Dana (Ky.), 28-31, the court, in discussing the limits of taxation, said:

"And that limit is, that a common burden should be sustained by common contributions, regulated by some fixed general rule, and apportioned according to some uniform ratio of equality. Thus, if a capitation or personal tax be levied, it must be imposed on all free citizens equally and alike; or if *ad valorem* or specific tax be laid on property, it must bear equally, according to value or kind, on all the property, or on each article, of the same kind, owned by every citizen; and no citizen or class of citizens owning any property of the kind subjected to taxation can be exempted constitutionally on any other ground than that of valuable *and peculiar*

public services; for otherwise, one man, or a 'set of men,' might be entitled to enjoy 'exclusive privileges,' or legal exemptions, which are substantially the same, without the only constitutional consideration of public services."

In the *City of Lexington* v. *McQuillan's Heirs*, 9 Dana (Ky.), 513, the court, Chief Justice ROBERTSON, delivering the opinion, said:

"Taxation may not be universal, but it must be general and uniform. Thus, if a capitation tax be laid, none of the class of persons thus taxed can be constitutionally exempt upon any other ground than that of public service; and if a tax be laid on land, no appropriated land within the limits of the state can be constitutionally exempted, unless the owner be entitled to such immunity in consequence of public service. The legislature, in the plenitude of its taxing power, cannot have constitutional authority to exact from one city, or even one county, the entire revenue for the whole commonwealth. * *

"But we are clearly of the opinion that, whenever the property of a citizen shall be taken from him by the sovereign will, and appropriated, without his consent, to the benefit of the public, the exaction should not be considered as a tax, unless similar contributions be made by that public itself, or shall be exacted rather by the same public will from such constituents, members of the same community generally, as own the same kind of property. Taxation and representation go together. And representative responsibility is one of the chief conservative principles of our form of government. * * * And although there may be a discrimination in the subjects of taxation, still persons in the same class *and property of the same kind* must generally be subjected alike to the same common burden. This alone is *taxation* according to our notion of constitutional taxation in Kentucky. * * * The object of this great guarantee was to secure every citizen against spoilation by a dominant faction, or by a rapacious public power, acting in obedience to the will of a

> constituent body for whose use his property may be taken, and from whom no similar contribution is required. And it was not a tax, because it was not general or public, but personal and exclusive, exacted by the public for its own use, from an individual alone, and not *from the public.*"

It might be here stated that the number of legacies and distributive shares exempted under this law, being all legacies and distributive shares from estates of ten thousand dollars or less, constitute much the larger portion in number and amount of all legacies given or distributive shares taken throughout the United States. Legacies received from estates of over ten thousand dollars throughout the United States are much smaller in amount than the legacies which are exempted, aud in this respect the case is similar to the exemptions in the Income Tax cases recently decided.

In *Barbour* v. *Louisville Board of Trade*, 82 Ky., 645, 653, the General Assembly of Kentucky, in order to establish a board of trade in Louisville to foster commerce in Kentucky, exempted the property of the Board of Trade from taxation. In discussing the illegality of the tax the court said:

> "The exemptiou of this corporation from state taxation is a tax, to that extent, upon every citizen of the commonwealth, as every other citizen must help to bear the burden thus lifted from the corporation.
>
> "As a general rule, *the test of the right to exempt property is the existence of the right to levy a tax to foster such property.* The levy of a direct tax upon the whole people of the state, to be paid to this corporation to forward the objects stated in their charter, would be declared at first blush unconstitutional, and yet that is what is indirectly done by the exemption. If the same power exercised by this corporation had been conferred upon a designated individual,

it would strike anyone as palpably beyond legislative authortiy. But there is no difference in principle between the corporation and an individual. If there is the power to exempt the one there is unquestionably the power to exempt the other. * * * The object must appear upon the face of the legislation to be directly for the *public good*, and of such a character as to call for the aid of the state to forward it in the exercise of a governmental function. * * *

"Every citizen is entitled to equal rights and equal privileges with every other citizen. In entering into the social compact, called government, he stipulates to bear only his proportion of the common burden of taxation, and when more is imposed upon him, his property is taken against his consent and without consideration, it is spoliation. The exemption of charitable institutions and schools has always been recognized as valid, because done in the exercise of a governmental function; but private undertakings, primarily for private gain or aggrandizement in any way, cannot be protected individually and specifically by the government, but must come under general laws that operate alike upon all."

In *State ex rel.* v. *City of Indianapolis* the Supreme Court of Indiana, 69 Ind., 375-378, said:

"It is the use of the property *for the public benefit* which will authorize its exemption from taxation by law. To exempt by law private property owned by a private person *and used for a private purpose* on account of the sex or domestic relation of the owner is a violation of the constitutional principle that taxation shall be uniform and equal on all property, both real and personal. The common burden of taxation should be regulated by a fixed general rule, apportioned and sustained by uniform ratio of quality. Exemption from taxation should be based only on a well grounded public policy *by which all share in the benefits.*"

Now under the act in question the exemption is made

for the private gain or aggrandizement of the legatee taking such legacy, and in no way for the benefit of the public. The legatee taking a legacy from an estate of $10,000 or under is as much responsible to bear his burden of taxation as a person taking a legacy of an estate of over $10,000, unless it should appear in some way that the person receiving the benefit of such exemption has performed some duty to the public or that the exemption in some way redounds to the benefit of the public and not to the benefit of the individual taking the legacy.

This question is so thoroughly discussed by Mr. Justice Field, in his separate opinion in the Income Tax cases, that it would seem quite unnecessary to go farther than to refer to that opinion. The question here under consideration, although involved in the *Income Tax* cases, was not decided by the court, but Mr. Justice Field gave a very clear and lucid opinion therein touching the invalidity of such law on account of such exemptions.

The justice said (p. 592):

> "The uniformity thus required is the uniformity throughout the United States of the duty, impost or excise levied. That is, the tax levied cannot be one sum upon an article at one place and a different sum on the same article at another place. * * * Mr. Justice MILLER, in his lectures on the Constitution (N. Y., 1891, pp. 240, 241), said: 'The tax must be uniform on the *particular article* and it is uniform within the meaning of the constitutional requirement if it is made to bear the *same percentage* over all the United States. This is manifestly the meaning of this word as used in this clause. The framers of the Constitution could not have meant to say that the government, in raising its revenue, should not be allowed to discriminate between the *articles* which it should tax.'
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> "In discussing generally the requirement of uni-

formity found in state constitutions, he said: 'The difficulties in the way of this construction have, however, been very largely obviated by the meaning of the word *uniformity*, which has been adopted, holding that the uniformity must *refer to articles of the same class, that is, different articles may be taxed at different amounts, provided the rate is uniform on the same class everywhere with all people and at all times.*

"*Exemptions from the operation of a tax always create inequalities, those not exempted must, in the end, bear an additional burden or pay more than their share.* A law containing *arbitrary exemptions* can, in no just sense, be declared uniform. In my judgment, Congress has rightfully no power, at the expense of others, owning property of a like character, to sustain private trading corporations, such as building and loan associations, savings banks, and mutual life, fire, marine and accident insurance companies, formed under the laws of the various states *which advance no national purpose or public interest and exist solely for the pecuniary profit of their members.*

"Where property is exempt from taxation the exemption, as has been justly stated, must be supported by some consideration that the *public, and not private*, interests will be advanced by it. Private corporations and private enterprises cannot be aided under the pretense that it is the exercise of the discretion of the legislature to exempt them. [The justice refers to the Kentucky cases referred to by us and others in support of his proposition.] Cooley, in his treatise on Taxation (2d Ed., 215), justly observes that: 'It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality; it would lack the semblance of legitimate tax legislation.'

"The income tax law under consideration is marked

> by discriminating features which affect the whole law. It discriminates between those who receive an income of $4,000, and those who do not. It thus vitiates, in my judgment, *by this arbitrary discrimination*, the whole legislation. * * * There is nothing in the nature of the corporations or associations exempted in the present act, or in their method of doing business, which can be claimed to be of a public or benevolent nature."

It seems to us that the reasoning of Mr. Justice Field is so potent as to determine the question at bar. It must be conceded that it was not the intention of Congress to tax the estate of decedent, but to tax the thing taken in the hands of the legatee or distributee, or the right to take the same, and there can be no object in this exemption except to benefit the legatees and distributees as private individuals, and is wholly an arbitrary discrimination, and was not made for the purpose of benefiting the public, but to advance interests of those receiving the legacies and distributive shares, and hence must be unconstitutional. This tax cannot be justified upon the ground of the right of Congress to create classifications for the purpose of taxation, because the persons receiving a $5,000 legacy from an estate of $10,000 belong to the same class of persons as those who receive a legacy of $5,000 from an estate of $100,000 or $1,000,000, and are no more entitled to the protection of the government, as private individuals, in the one case than in the other.

It is but a socialistic attempt on the part of Congress to make one portion of the community bear the burdens of the whole. It is an entering wedge, which, in the end, will destroy all the limitations contained in the national constitution; and full power, if sustained, will finally be

exercised by Congress to make the few bear all the burdens by exempting the men of moderate means or of small means from any taxation and throwing it upon those who are more prosperous by reason of being more industrious. If there can be any exemption, once established, under the national constitution for the purposes of taxation, there can be no limit assigned whereby Congress may not impose the burdens of government upon the few and relieve entirely the many.

If Congress had confined itself to taxing all inheritances at the same rate there could be no fault found upon the ground of want of uniformity. But this law, in our judgment, is unconstitutional not only because it exempts the greater number of legacies and inheritances from any taxation, but because it discriminates in the progressive feature of the law and taxes persons receiving the same amount in one case at a higher rate than in another.

These two sections, 29 and 30, of the act of Congress, approved June 13, 1898, entitled "An Act to provide ways and means to meet war expenses and for other purposes," should be held unconstitutional, null and void, and the decree of the Circuit Court should be reversed and remanded with instructions, for the reasons hereinbefore stated.

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